

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI.

OCTOBER TERM, 1873, AT ST. LOUIS.

CONTINUED FROM VOL. LIII.

STATE OF MISSOURI, Respondent, *vs.* KATE CLARKE, Appellant.

1. *Social evil ordinance of St. Louis valid.—General law repealed by charter.—*

The power given to the City Council of St. Louis, under the municipal charter of 1870, Art. III, § 1, (Sess. Acts 1870, 463-4) "by ordinance not inconsistent with any law of the State" * * "to regulate bawdy houses," operated as a repeal of the General Statute prohibiting them, in respect to the city of St. Louis. And a city ordinance licensing them is valid, under the charter, notwithstanding the general inhibition of the statute, and a license taken out in conformity with the ordinance will shield them from criminal proceedings by the State.

Such ordinance is not void as against public policy or good morals. The best indication of public policy is to be found in the action of the Legislature. And there is no warrant to suppose that the law had any other purpose than the promotion of morality and health to the citizens.

2. *Constitution—Law unconstitutional in part not wholly void.—Unconstitutional provisions of a law do not render it void as to other and independent provisions.*

PER VORIES J., DISSENTING, SHERWOOD J., CONCURRING.

3. *St. Louis, charter, granting authority to regulate brothels, not a repeal of general law.—*Section 19, Art. VIII, Ch. 42 of the Statutes of Missouri (W. S., 502), prohibiting bawdy houses, is not repealed by the Charter of the city of St. Louis of 1870, Art. III, § 1. (Sess. Acts 1870, 463-4.) The general law prohibiting and the special law regulating brothels are not inconsistent.

*Appeal from St. Louis Court of Criminal Correction.**Lackland, Martin & Lackland*, for Appellant.

I. The Charter of the City of St. Louis gives the City Council power by ordinance, to "regulate or suppress" bawdy or disorderly houses, houses of ill fame or assignation.

It is evident, that the Legislature intended to give the City Council power to control bawdy houses. And this power includes the idea of permissive existence.

Under the power to "regulate commerce," Congress has full and entire control of the whole subject as a unit. The power not only includes properly the subject of commerce, but also all the necessary vehicles and appliances necessary to carry it on. (2 Sto. Const., 510, § 1061; *Gibbons vs. Ogden*, 9 Wheat., 1; *Brown vs. Maryland*, 12 Wheat., 419.)

It is true, that by the general law, the keeping of a bawdy house is prohibited, and the charter provision amounts to a repeal of the general State law, so far as the City of St. Louis is concerned. (*State vs. Binder*, 38 Mo., 450.)

In the case of *Binder*, the right of the city to exercise the power depended upon a condition of a majority vote of the legal voters. In the present case, if the power be contained in the word "regulate," the city is invested with the power without condition. With this exception, the cases appear to be the same in principle.

The case of the City of St. Louis vs. *Laughlin*, does not apply here. The question decided in that case was, whether the general clause giving power to said city to tax "all other business, trades, avocations or professions whatsoever" included lawyers.

In this grant of power, which we are considering, bawdy houses, assignation houses, and houses of ill fame, are expressly named.

J. G. Lodge, for Appellant.

I. The ordinance in question undoubtedly permits and authorizes bawdy houses to be kept in this city under certain restrictions.

The first question to be considered then, is, whether the city charter authorizes the City Council to pass such an ordinance as Ch. XIV. of the ordinances of the city of St. Louis, or so much of said ordinance as, under certain restrictions, permitted defendant to keep said house.

The term "to regulate" as used in this charter, in every place where it is found in this section, is of broad and uniform significance, and means nothing else than to prescribe the rule by which the subject to which it relates is governed.

And in the law generally it has this significance. Where the term is used in the Constitution of the United States, it has this meaning. Just such authority with reference to bawdy houses was never conferred by any previous charter.

It has been laid down as a rule of interpretation of statutes, since the days of Lord Coke, that in order to arrive at the meaning of the act under consideration, we must consider what the law was before the mischief, the remedy, and the true reason for it, which he says is the very lock and key to set open the windows of the statute. (1 Bish. C. L., 566.)

The first charter of St. Louis, where any authority was expressly given on this subject, was that of 1822, when St. Louis was yet called a town. And in that charter the only power given was "to restrain and prohibit." (R. O. 1866, p. 4, § 12.)

In 1835, the charter was revised and amended by the Legislature, and the same language was held. (R. O. 1866, p. 48, § 32.)

In the year 1839, a new act of incorporation was passed, in which the authority given, with reference to houses of prostitution, is to tax and prohibit. The exact words are: "To tax, restrain, prohibit and suppress tippling houses, dram-shops, gaming and gambling houses, and bawdy and other disorderly houses." (R. O. 1866, p. 56; § 1, sub-sec. 23.)

And again in 1841, upon the amendment of the charter, the same language was held as in the charter of 1839.

In 1843, an act passed the State Legislature and became a law, under which the only authority given to the city over bawdy houses was to suppress them. (R. O. 1866, p. 75,

(Art. 3, § 2, sub-sec. 22.) And the same is true of the revision and amendment of the charter in the years of 1851 and 1867. But in the year 1870, the present charter of the city of St. Louis was adopted, and in it the Legislature gives the city power "to regulate" or suppress bawdy-houses. This is a marked change.

Now if we apply our rule of interpretation, much light is let in as to the evident intent of the Legislature in making this change. From the time when St. Louis was a small town, (1843,) and until 1870, a uniform system of forcible repression only had been authorized; but in 1870, when the city had acquired such importance and dimensions, and when all legislation in regard to it was of such vital interest, a radical change concerning this whole subject was made, if we are to take language in its usual and legal sense.

The term "to regulate," as used in this charter with reference to bawdy houses, means to prescribe the rule by which they are to be governed. Whenever this word is used in the charter, it has this meaning, and it cannot have one meaning in all other parts of the charter (and it is a word of frequent occurrence), and a different meaning in this solitary instance, as applied to houses of ill-fame. The popular and usual meaning of the word is the same as above defined. Webster's definition is: "Regulate: to adjust by rule; method or established mode; to direct by rule or restriction; to subject to government, principles or laws." "Regulation: a rule or order prescribed for management or government." Worcester's definition is substantially the same.

The term regulate has also received judicial notice. And the Supreme Court of the United States, in interpreting that clause of the national constitution, which says: "Congress shall have power to regulate commerce," &c., says, that the word regulate, as used in that connection, means to prescribe the rule, by which commerce is to be governed. (9 Wheat., 146; Sto. Com. Con., § 1061; Dwar. Stat., 274 and n.)

II. But it is said, that the general words, with which article 3 of the charter of St. Louis is headed, are to govern this

term, "to regulate," in a subsequent special clause of said article. The general words are as follows: "The Mayor and City Council of the City of St. Louis shall have power within the city, by ordinance not inconsistent with any law of the State," to pass ordinances, &c.

Now, this same general clause, which I have just read, was in the previous charter of St. Louis—that is of 1867. But this word "regulate," with reference to bawdy houses, was not in that charter. The only power therein given (in the charter of 1867) was to suppress.

The Legislature, in passing the city charter of 1870, must be presumed to have had these general words in mind, when they amended the charter by introducing the special clause, giving the City Council power to regulate, as well as to suppress, bawdy houses, &c.

If the Legislature did not intend to give the city the power over this subject, that it did over every other subject which it gave the city power to regulate, why did it not leave the law as it was?

The city had power under the charter of 1867 to "suppress" bawdy houses. And can it be conceived, while we are seeking for the legislative intent of this matter, that the Legislature amended the charter of 1867, in this marked and emphatic manner, to still give the power only to suppress these houses, a power which the city had before?

III. The general words in one clause of a statute may be restrained by the particular words in a subsequent clause of the same statute, where a general intention is expressed, and the act also expresses a particular intention, incompatible with the general intention. The particular intention is to be considered in the nature of an exception. (*Dwar. Stat.*, 110, 117, 160, 273; *Sedg. Con. & Stat. L.*, 423, 61, 133; *Rex vs. Archb. of Armagh*, 8 Mod., 5; *Churchill vs. Crease*, 2 Moore & P., 415; 5 Bing., 180; *Bishop Stat. Crimes*, 126, and n.; *State vs. Binder*, 38 Mo., 450; *State vs. Macon Co. Court*, 41 Mo., 453; 47 Mo., 146.)

This interpretation will give effect to this special clause of

the charter and reference to houses of ill-fame, and it cannot be denied, that it is a special clause, and that it is subsequent to the general words at the beginning of Article 3 of the charter.

And the said charter ordinance being irreconcilably inconsistent with, and repugnant to, the State law; and the charter, being a special act of the Legislature, and passed subsequently to the State law, we claim, repeals the State law by implication. (51 Mo., 420; *Deters vs. Renick*, 37 Mo., 597; 47 Mo., 29; *Vastine vs. Probate Ct.*, 38 Mo., 529; 47 Mo., 146; *State vs. Macon Co. Ct.*, 41 Mo., 453; *St. Louis vs. Alexander*, 23 Mo., 483; *Tierney vs. Dodge*, 9 Minn., 166; *State vs. Binder*, 38 Mo., 450; 1 Blackst., 89; *State vs. Morristown*, 33 N. J., 57; *State vs. Branin*, 3 Zabr., 484; *State vs. Clarke*, 1 Dutch., 54; *State vs. Jersey City*, 5 Dutch., 170; *In re Goddard*, 16 Pick., 504; *Dill. Mun. Corp.*, § 54, and n.; *Ang. & Ames' Corp.*, 333; *Cooley's Con. Lim.*, (2nd Ed.), 198; *Comm. vs. Patch*, 97 Mass., 221; *St. Louis vs. Weber*, 44 Mo., 547.)

And a city may pass ordinances inconsistent with the general law of the State, where the power to do so is clearly given in the special act of incorporation or charter. If the charter contravenes the general laws of the State, so may ordinances do the same to the extent authorized by the charter, and they will be valid. (*Cooley's Con. Lim.* 198, and n. 3; *Dill. Mun. Corp.*, § 54 and n.; 1 Bish., C. L., § 58, and n. 3; *State vs. Binder*, 38 Mo., 450.)

IV. It cannot be objected to as of supposed immoral tendency, because that is a matter for the Legislature to consider. If a law is passed, and it contravenes no provision of the constitution, State or national, it cannot be overthrown, because in the opinion of a court it is of questionable morality. (*Sedgw. on Stat. Con. L.*, 180 to 188, and cases cited; *Cooley's Con. Lim.*, 169 and n.)

M. W. Hogan, for Respondent.

1. The ordinance, under which the defendant claims the right to carry on and maintain a bawdy-house in the city of

St. Louis, is no legal defense to this action; because such ordinance is against religion and good morals; because it contravenes the statute law of the State; and because it is against the spirit of the common law and constitutional law of the land. The city council had no right, power or authority, from the wording of the city charter, which merely says, "to regulate or suppress bawdy or disorderly houses, houses of ill-fame or assignation," to license such houses, and, for the payment of taxation, to protect them in the carrying on of their nefarious calling. The words "to regulate" give the council no such sweeping power. (City vs. Laughlin, 49 Mo., 559.) An ordinance to be effective must be in accordance with the statute and common law of the State, for it has been so repeatedly declared. (Sedg. Stat. and Const. law, 313.) But this ordinance would not only alter, but entirely do away with the common and statute law of the State at one "fell swoop."

II. The city council in the making of ordinances has no power to transcend the authority given it by the charter. (Sedg. Stat. and Const. Law, 467, 469; Halstead vs. The Mayor of the City of N. Y., 3 Com., 431.)

III. A license, as applied to the case at bar, is a contract between the city of St. Louis and the defendant, wherein it is agreed, that for the consideration of a certain sum of money to be paid to the city as taxes, that the city will authorize, license and protect defendant and all of her class, who take out such licenses and pay such taxes, in the carrying on of such bawdy-houses, or houses of ill-fame within the city. Such a contract cannot stand. For all contracts founded on considerations *contra bonos mores* are void. (Sto. Cont., (2d Rev. Ed.) §§ 541, 542; 2 Kent's Com., 466; 2 Hill, 434.)

IV. But the offense, with which the defendant is charged, is a wrong in itself, and no human legislation can make it right. It always has been prohibited, and was held to be a misdemeanor by the common law of England, as being against Divine and moral law, and such doctrines of the com-

mon law for the prevention of this and kindred vices were brought over to this country by the early colonists; and so well established is the law for the prevention of keeping bawdy houses, the punishment for adultery, fornication and like offenses, that although not written in the constitution, I might say, that by common consent they have become part of the constitutional law of the land, for we find in almost every State of this Union similar laws to the one for the violation of which the defendant stands charged.

Henry Hitchcock, for Respondent.

I. The ordinance of July 10, 1871, as a whole, is "repugnant to, and irreconcilable with, the general law of the State with reference to bawdy-houses."

The grant of legislative power to the city on this subject is contained in these words, and none other, in the city charter of March 4, 1870, viz: (Sess. Acts 1870, p. 463.)

Article III. Section 1. "The Mayor and City Council shall have power, within the city, by ordinance not inconsistent with any law of the State, first to levy, and collect taxes, &c., &c. * * * * * (Sess. Acts 1870, p. 464.) Tenth, to license, regulate, tax, or suppress ordinaries, hawkers, &c., &c., * * * * * and to suppress prize-fighting, &c., &c., * * * * * and to regulate or suppress bawdy or disorderly houses, houses of ill-fame or assignation."

But if the ordinance was inconsistent with, and repugnant to, the State law—as claimed by the defendant—then the ordinance was *ultra vires* and void. (Dill. Mun. Corp., §§ 55, 251, 300, 353, and many cases cited; also cases cited *infra*, from Mo. Reports.

II. The State law in question (1 W. S., 502, § 19; W. S., Chap. 42, "Crimes and Misdemeanors," Art. VIII, § 19.) was not repealed by implication, either by the tenth clause of § 1 of Art. III, of the Revised Charter of 1870, (Adj. Sess. Acts 1870, p. 464, above quoted,) or by the enactment by the Mayor and City Council, under, and (as alleged) in pursuance of, this charter power, of the ordinance of July 10, 1871.

1. "Repeals by implication are not favored or allowed, un-

less the first act be so inconsistent, as not to stand with the subsequent act." (Glasgow vs. Lindell, 50 Mo., 79; State vs. Macon Co., 41 Mo., 459; St. Louis vs. Alexander, 23 *ib.*, 483; Sedg. Stat. Const. Law, 127 and cases cited; Bowen vs. Lease, 5 Hill, (N. Y.,) 221; Brown vs. Co. Comrs., 21 Penn., St., 37; Williams vs. Potter, 2 Barb., S. C., 316; Comm. vs. Herrick, 6 Cush., 465; Pot. Dwar. Stat.; City of St. Louis vs. Laughlin, 49 Mo., 559.)

Municipal corporations can exercise no powers not granted either expressly, or by necessary implication, in their charters; and that any reasonable doubt, as to existence of an alleged power, must be solved against the corporation. (Rugles vs. Collier, 43 Mo., 375; St. Louis vs. Clemens, *Id.*, 404; Hitchcock vs. St. Louis, 49 Mo., 488; City of St. Louis vs. Laughlin, 49 Mo., 559; Dill. Mun. Corp., §§ 55, 300, and many cases cited in notes.)

There is no such expressed or implied repugnance between the charter and the general law.

III. The appellant however, makes the following points in support of the alleged repeal by implication:

1. That the word "regulate" was first used in this connection in the Revised Charter of 1870, and in no previous charter of this city, whence it is argued, that the Legislature then determined upon, and thus expressed, a new and different policy with reference to this city's power over this subject.

2. That the ordinance in question, passed in July, 1871, amounted to a "contemporaneous construction" by the city of this new word "regulate," which, in considering the disputed right of the city to pass such ordinance, this court will take into account.

3. That the meaning of the word "regulate," as settled by courts and lexicographers, is sufficiently broad to sustain the alleged repeal by implication.

4. That the words, "not inconsistent with any law of this State," at the beginning of section 1, of Art. III. of the charter, express merely the general intention of the Legislature; whereas, the words "to regulate or suppress" express a par-

ticular intention, which must prevail over the power; that therefore, the power to "regulate" (as defined by appellant) must be taken as an intended exception to the general prohibition to pass ordinances "inconsistent with any law of the State."

5. That when a charter provision is directly in conflict with, or clearly expresses an intention to repeal, a prior general law, it does repeal such law.

To which it is replied for respondent:

1. As to the 5th or last preceding proposition, it is correct as a legal proposition, but totally irrelevant here, because no such conflict or intention to repeal appears. That legal proposition applies only, where, either in terms or by unavoidable implication, it appears on the face of the two statutes, that both cannot stand. (See authorities cited *supra*.)

2. As to the 1st point, viz: the alleged change of policy on the part of the Legislature, deduced from comparison of the successive city charters, no such inference is possible. On examining those charters it appears, that out of 51 years in question, the corporation was, during 21 years, "to restrain or suppress," with the added (not the alternative) power, during the last four of these years, to "tax," but this during those 4 years only, in all; during the next 17 years, it could only "suppress;" and during the last 3 years, it could "regulate or suppress."

3. The word "regulate" means "to make rules for." But what kind of rules are authorized or intended by its use must be ascertained from the subject matter, the scope and objects of the statute, and the settled rules of construction of municipal charters. This word has not, in this connection, any such meaning as alleged by appellant. (Dill. Mun. Corp., § 292; Gibbons vs. Ogden, 9 Wheat., 196; Cincinnati vs. Bryson, 15 Ohio, 625; 2 Sto. Const., (Ed. 1858,) 3, § 1061; *Id.* (Cooley's Ed. 1873), 4, § 1061.)

The ordinance is, but the charter is not, repugnant to the State law.

4. As to what kind of rules the city may make under such

a grant of power, it is insisted : "Where the power to legislate upon a given subject is conferred upon a municipal corporation, but the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." (Dill. Mun. Corp. § 252, and cases cited.)

And since the charter provisions referred to (viz: 10th clause of § 1, of Art. 3, of Rev. Charter of March 4, 1870, Adj. Sess. Acts of 1870, p. 464,) are simply a grant of power to "regulate or suppress" such houses, with no specific provision as to the mode of exercising such power, it follows: that any ordinance based on this provision will be invalid unless it "is reasonable and lawful, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the State." (Dill. Mun. Corp., § 253 and cases cited; *St. Louis vs. Weber*, 44 Mo., 550; *Paris vs. Graham*, 33 Mo., 96; *St. Louis vs. Cafferata*, 24 *Id.*, 97; *St. Louis vs. Allen*, 13 *Id.*, 414; *St. Louis vs. Bentz*, 11 *Id.*, 62; *Baldwin vs. Green*, 10 *Id.*, 410; *Harrison vs. State*, 9 *Id.*, 531; (the two cases last cited are directly in point on the case at bar,) *Jefferson City vs. Courtmire*, 9 *Id.*, 693; *St. Louis vs. Smith*, 2 *Id.*, 114; *State vs. Plunkett*, 3 *Harrison*, (N. J.,) 6; *Austin vs. Murray*, 16 *Pick.*, 125; *Merriam vs. Moody*, 25 *Iowa*, 170; *Minturn vs. Larue*, 23 *How.*, (U. S.,) 436. There is no conflict with this in the case of *State vs. Binder*, 38 Mo., 456.)

5. The construction put upon the word "regulate" by defendant, viz: that this word implied a grant of charter power superior to, and necessarily conflicting with, the general criminal law on the same subject, and that therefore, this ordinance operates to repeal that State law within the city limits, is unreasonable as leading to absurd conclusions. For if this be so, then the word "regulate" confers exclusive jurisdiction on the city as against the State courts. And not on this subject only, but on all subjects where a like power "to regulate" is given. Whence it follows, that the charter of 1870 operated within the city limits to repeal all prior State laws against

gambling and betting, against riots and breaches of the peace, against vagrants, against nuisances, dangerous trades or factories, and all other things affecting the public health, and many other matters which the city has power to "regulate." This is a *reductio ad absurdum*, and is contrary to express rulings of this, and other courts. (Harrison vs. State of Mo., 9 Mo., 531; Baldwin vs. Green, 10 *Id.*, 410; State vs. Plunkett, 3 Harrison, (N. J.,) 6; Minturn vs. Larue, 23 How., (U. S.,) 436; St. Louis vs. Cafferata, 24 Mo., 97.)

6. In reply to the remaining point made for defendant, viz: that the special grant of power "to regulate," &c., is to be considered an exception to the "general intention" shown by the words "not inconsistent with any law of the State," it is insisted: that this suggestion is based upon a complete misapplication of the principle referred to.

The rule laid down by this court in *The State vs. Macon County*, 41 Mo., 459, is, that "a later statute, which is general and affirmative, does not abrogate a former which is particular, unless negative words are used, or unless the two words are irreconcilably inconsistent."

Here no question arises between a prior and later act, but it is sought to nullify a general clause at the beginning of the 1st section of Art. 3 of the charter, intended to limit and circumscribe every following grant of power in that section, by a subsequent special clause setting forth one of these grants.

The Legislature begins the enumeration of the grants of legislative power, by declaring as a condition precedent to the exercise of any of such by the city, that it shall not contravene the general law of the State; and it is asserted here, that this condition precedent is immediately afterwards set aside by the simple mention of a power which can exist only under that condition.

In fact, the case above referred to, and cited on this point by defendant, is directly against the position taken for her here.

Here the argument from this record might well close, for if the foregoing propositions are correct, the judgment below must be affirmed.

If, however, the court shall see proper to consider the validity of the ordinance itself as a whole, not only as to the use which this defendant has attempted to make of it, but as to the power of the city council to enact it, the following further considerations are submitted :

I. According to the undisputed rules of construction of municipal charters, and in view of the uniform course of criminal legislation in this State, the 10th clause of section 1, of Article III of the Revised Charter of 1872, cannot be interpreted to sustain this ordinance, nor can the Legislature have intended by that clause to empower the Mayor and City Council to enact said ordinance, taken as a whole; and further :

II. Even had the Legislature intended by that clause to grant to the city authorities the extraordinary powers deduced from that one word "regulate," and embodied in this ordinance, such grant would be void, as in derogation of the rights of the citizen, and beyond the constitutional powers of the Legislature itself.

This ordinance cannot be held valid under the clause referred to :

(a.) If thereby the city assumes to exercise powers not in said clause expressly granted or resulting therefrom by reasonable and necessary implication. (Dill. Munc. Corp., § 251; *Id.*, § 55, and cases cited; *Hitchcock vs. St. Louis*, 49 Mo., 484.)

(b.) Or if the city assumes thereby to exercise powers which are oppressive, unfair or discriminating in their operation. (*St. Louis vs. Weber*, 44 Mo., 547; *Coms., &c. vs. Gas Co.*, 12 Pa. St., 318; *Dill. Munc. Corp.*, §§ 254, 256; *Mayor vs. Winfield*, 8 Hump. (Tenn.), 707; *Chicago vs. Rumpff*, 45 Ill., 90; *Whyte vs. Mayor, &c.*, 2 Swan (Tenn.), 364; *Mayor, &c. vs. Thorne*, 7 Paige Ch., 261.)

(c.) Or powers which are in contravention of the general laws and legislative policy of the State, which are not repealed in terms or by necessary implication by the charter. (*Dill. Munc. Corp.*, § 253; *Id.*, § 55, and cases cited.)

(d.) Or powers whose exercise conflicts with the funda-

mental rights of the citizen, especially those relating to personal liberty or the rights of personal security. (Dill. Munc. Corp., § 253; *Id.*, § 55, and cases cited.)

2. It is plain, on inspection of this ordinance, that it is "an entire by-law," framed and enacted for a simple general purpose, each part or section having relation to all the rest and having a general influence over the others. If, therefore, any of its essential provisions are void, the entire ordinance is void. (Dill. Munc. Corp., § 354, and cases cited; *Warren vs. Mayor*, 2 Gray, 84; *Comm. vs. Hitchings*, 5 Gray, 482.)

3. In considering whether this ordinance is valid, the court will be governed by the terms and provisions of the ordinance itself, and by those alone. And unless the powers conferred, and the directions given, are, on the face of the ordinance, clear, well-defined and conformable to the law of the land, it will be the duty of the court, especially where the gravest questions of personal rights and liberty are involved, to declare it void. (*Fisher vs. McGier*, 1 Gray, 1.)

4. It is insisted for the respondent, that the ordinance is liable to each and every of the fatal objections above suggested:

1. It contravenes the general criminal legislation of the State in *pari materia*. The assertion of this proposition is the actual key note of this defendant's appeal here. (Dill. Munc. Corp., 253.)

2. It also contravenes the settled doctrine of the common law and the established policy of the State on this head of criminal legislation. For the effect and scope of this ordinance, as a whole, is nothing else but to protect the trade of harlotry within the limits of the city, provided only, that those who practice and maintain that trade will comply with certain regulations, aimed exclusively at certain loathsome physical consequences of their crime, but utterly ignore that which is "the gist of the offense," to-wit: its injurious effect on public morals. (2 *Bishop's Crim. Law*, § 65; 1 *Id.*, (Ed. of 1872, 5th Ed.) § 1083; Dill. Munc. Corp., §§ 55, 253 263, 300.)

3. It is oppressive, discriminating and unjust; and this in more than one way; for, it assumes to inflict upon property owners, in whose neighborhood permission to keep a brothel is given by the police commissioners, that which is a nuisance at common law, and maintaining which is penal by statute, this under color of the official sanction of the corporate authorities. It also assumes, as below more fully stated, to arm irresponsible officers with extraordinary and oppressive powers against persons who are assumed to belong to a certain class or to pursue a certain criminal occupation. (4 Blacks. Comm., 167; 1 Bish. Crim. Law (Ed. 1872), § 1083; White vs. Mayor, &c., 2 Swan, 364.)

4. By this ordinance the city assumes to impose a tax of large annual amount upon persons engaged, or alleged to be engaged, in a certain criminal occupation, as such, although no power to either license or tax such occupation is conferred in said 10th clause of section 1 of Article III of the charter in respect of said occupation; whereas, in said 10th clause, &c., express power to license and tax is conferred in respect of certain specified trades and occupations; such tax moreover, being levied not for the purpose of suppressing this occupation, but avowedly to provide the means of treating certain physical ailments to arise from its expected and permitted continuance. (Dill. Munc. Corp., §§ 605-6, 291; Cooley's Const. Lims., 201, 205; St. Louis vs. Boatmen's I. & T. Co., 47 Mo., 150; Dill. Munc. Corp., § 291, 295, 299, and cases cited in notes; Mayor, &c. vs. Beasley, 1 Hump. (Tenn.), 240.)

5. The foregoing objections show, that by this ordinance the city has attempted to usurp powers, which the Legislature did not intend to, nor has, conferred by the charter provision "to regulate," &c. But by said ordinance, the city also assumes to exercise powers which the Legislature itself has not constitutional power to confer, namely:

1. It assumes to appoint special officers with power, and whose duty it is declared to be, at their discretion, to enter dwelling houses and private apartments upon their own pri-

vate opinion as to the mode of life of the inmates, without warrant or other authority of law for such trespass, and without providing for any judicial ascertainment, or even any lawful charge or complaint as to the character or use of such houses, or for the conviction of any such inmate in respect of any unlawful act, which is in violation of the bill of rights. (Art. XXIII of Bill of Rights, 1 W. S., 37; Sec. 11 of Ordinance; Fisher vs. McGier, 1 Gray, 1; Ex parte Milligan, 4 Wall., 2.)

2. It further requires such officers, without reference to or providing for the consent of any such inmates, to make examination of her physical condition in respect of certain suspected diseases, the "explorations" required by said ordinance, being necessarily such as, if attempted without such consent, would constitute a criminal assault of the most odious and aggravated character. (Sec. 11 of Ordinance; 4 Blacks. Com., 177, 213; 1 Bish. Crim. Law (Ed. 1872), §§ 546, 548; Art. XXIII Bill of Rights, 1 W. S., 37.)

3. Said ordinance further authorizes such officer, on his own judgment, that if any such inmate is affected by a certain disease, "to order her removal or cause her arrest and commitment to the hospital," to remain there without bail or lawful opportunity of release, till declared cured; and the refusal to obey such order is declared a misdemeanor. This, on the plea of authority in the city officers to guard against contagious diseases, although the disease in question is not within the definition of a nuisance, nor within the lawful powers or remedies applicable to nuisances; nor is such disease contagious except by the voluntary criminal act of third persons; nor can the intent, either to communicate or receive such infection, be lawfully presumed from the mere existence of said disease in a given person. (1 Bish. Crim. Law (Ed. 1872), § 490; 4 Blacks. Com., 166; People vs. Albany, 11 Wend., 539; Sedg. Stat. and Con. Law, 465; 1 Russell Crimes, 107-8; Fisher vs. McGier, 1 Gray, 1.)

4. Said ordinance also undertakes to compel any person keeping a brothel, and thereby subject to a criminal prosecu-

tion under the State law, to furnish to the health and police commissioners, on their demand for same, full information as to such house and the unlawful use thereof; or, in other words, to give evidence against herself in a criminal matter, on penalty of a misdemeanor for refusing, which is a violation of the Bill of Rights. (Sec. 18 of Ordinance; Art. XVIII of Bill of Rights, 1 W. S., 36.)

NAPTON, Judge, delivered the opinion of the court.

This was an indictment under the general statutes against defendant for keeping a bawdy house. The defendant pleaded a license from the city authorities under an ordinance, Chap. 14, passed by the Mayor and Common Council, and it is conceded, that the license is in proper form and was authorized by the ordinance. The Court of Criminal Correction, however, held the defense to be unavailing, because the ordinance was not valid. And the only question in the case is, whether the city authorities had power under their charter to pass this ordinance. The language of the charter is, that the city shall have power to "regulate or suppress bawdy houses." It would seem that resting on these words alone, a doubt would hardly be entertained as to a grant of the power; but at the beginning of section 1, of article third, in which this grant is made, the Legislature use these words: "The Mayor and City Council shall have power within the city, by ordinance, not inconsistent with any law of the State, first to levy and collect taxes," etc., and then proceeds to a specific enumeration of the several powers granted, in all nearly twenty, and embracing a great variety of subjects. The ninth of these clauses is to "license, tax and regulate auctioneers," etc. The tenth is to "license, regulate, tax or suppress" ordinaries, etc., and "to suppress" prize-fighting, etc., and to regulate or suppress bawdy houses.

It is clear, that the Legislature understood the difference between regulation and suppression, and whilst they only conceded to the city the power to suppress prize-fighting, gambling houses, etc., they allowed the city to either suppress or regulate bawdy houses.

Now, by the general law of the State, long before the passage of this charter, and since, bawdy houses are totally prohibited and declared nuisances, and their keepers are indictable, and on conviction heavily punished both by fine and imprisonment.

And so, in the various charters granted to the city of St. Louis previous to 1870, the authorities of the city had only power to suppress these houses. There was in the charter of 1839 and 1841 a power given to tax, restrain, prohibit, and suppress, but, from 1841 down to 1870, the power was simply to suppress.

The change in 1870 was a significant one, and undoubtedly meant a change in the policy of the Legislature—very easily accounted for from the fact, that St. Louis had become a large city with nearly half a million of inhabitants—and the Legislature then deemed it advisable to throw upon the authorities of the city the responsibility of deciding what legislation would best promote the morals and health of the city, and therefore virtually said to them: “You are more competent to decide this matter, which concerns you so nearly, than we are. We therefore authorize you to enforce the general laws of the State on this subject and suppress these houses, or to regulate them, as you may think best.”

The meaning of the word “regulate” has been discussed in this case; but it is a word which from its Latin origin needs no explanation. It certainly implies the continued existence of the subject matter to be regulated.

“To regulate commerce,” are words found in our Federal Constitution, and which have received a judicial interpretation, and they certainly conceded, that the commerce, concerning which Congress was allowed to make regulations, was to be allowed under some rules. It did not mean to annihilate or suppress, or to prohibit under all and every circumstance. No regulations or rules are necessary concerning an evil absolutely prohibited.

The only difficulty in the case arises from the fact, that whilst the Legislature of the State have clearly and specifical-

ly entrusted to the municipal Legislature of St. Louis a power to regulate this subject, as they thought most expedient, they have in the same enactment declared, that such legislation must be consistent with the general laws of the State. It is perfectly plain, that this general declaration and the specific grant of power are totally irreconcilable. For the State law had never allowed regulations of any kind concerning bawdy houses, but had absolutely prohibited them, and made them nuisances and obnoxious to prosecution by the law officers of the State.

The question then arises, whether this general prohibition, or this special permissive existence under regulation, must prevail, and we are clear that a particular specified intent on the part of the Legislature overrules a general intent incompatible with the specific one.

Many authorities might be cited on this general proposition, but the case of the State vs. Binder, 38 Mo., 451, is directly in point in this case.

In that case, the Legislature authorized the city of St. Louis to allow certain beer saloons to be kept open on Sunday, though it was expressly prohibited everywhere else, and the court regarded this as a special exemption from the general law, and, so far as the city was concerned, necessarily a repeal of the general law.

There is no doubt, that the city authorities of St. Louis have no power except such as has been confided to them by the Legislature. No authorities are needed to establish this proposition, as this court has repeatedly recognized the doctrine. There is just as little doubt that, looking at the previous legislation concerning this subject in all the charters of the city, and considering the emphatic change made in 1870, and the subsequent action of the city authorities on that change, and the subsequent silence of the State Legislature on the subject, there was a deliberate intention on the part of the Legislature to leave this subject to the control of the people of St. Louis and their legitimate representatives in the Council.

It is said, that this ordinance is in subversion of the common law—contrary to the general law of the State—against public policy—and of immoral tendency; and that it contains provisions which infringe on the constitutional rights of citizens.

The Legislature have a right to change the common law—it has a right to allow the legislative authorities of St. Louis to regulate the subject now under consideration differently from what it is in the other portions of the State. It is a naked assumption to say, that any matter allowed by the Legislature is against public policy. The best indication of public policy is to be found in the enactments of our Legislature. To say that such a law is of immoral tendency is disrespectful to the Legislature, who no doubt designed to promote morality, and it is altogether unwarranted to suppose that the object of the law or the ordinance is for any purpose but to promote the morals and health of the citizens. Whether the ordinance in question is calculated to promote the object, is a question with which the courts have no concern. With the expediency, or propriety, or wisdom, of a legislative enactment, we have nothing to do. If a constitutional right is infringed, the courts are open to afford redress. We have no opinion, and therefore express none, about the expediency of this ordinance. Arguments on that point should be addressed to the State or city—Legislature. It would be a novel exercise of judicial power to pass on the expediency of legislative enactments—a matter outside of the province of courts of justice. The only question we have to decide is, whether the power existed to make the law, and we think that the Legislature granted this power.

If there are provisions in this ordinance, Chap. 14, which infringe on the rights of citizens, male or female, protected by the constitution and laws of the State, and such provisions are attempted to be enforced, the remedy is obvious. But even according to the case referred to in 1 Gray, it is not pretended that unconstitutional provisions in a law make it totally void. On the contrary, it is well settled, that they do

not, and that a law may well stand, so far as it is constitutional, although it has in it certain provisions which are not valid. And in this case the only question was, whether the defendant's license under the ordinance was a protection. No question, concerning the medical examination provided for in certain sections of the ordinance, arose.

No complaint on this subject was made by any one affected by the provisions said to be oppressive and in opposition to our bill of rights.

It was in fact conceded, that various provisions of the ordinance were entirely unexceptional so far as the State constitution was concerned, and it was only insisted, that the general intent and scope of the ordinance was to promote immorality. Of this we are not authorized to judge. The legislative authorities of St. Louis are more competent and better qualified to decide this question than this or any other court. We doubt not, that their intention was to promote the public morals. Whether the ordinance in question was the best mode of doing this, was a matter they were authorized to decide. This court has no power to revise their decision on this question—it was a legislative, not a judicial question.

Judgment reversed. Judges Adams and Wagner concur.

Dissenting opinion by Judge VORLES.

This was a prosecution against the defendant under the nineteenth section of the general statutes, page 818, for setting up and keeping a bawdy-house or brothel. This section provides, that "Every person who shall set up or keep a common gaming house, or a bawdy-house or brothel, shall on conviction, be adjudged guilty of a misdemeanor and punished by a fine not exceeding \$1,000."

It is not pretended by the defendant, that she is not guilty, as charged, of a violation of this statute, provided said statute is still in force within the city limits of the city of St. Louis; but it is insisted, that this section of the statute has been repealed, so far as the inhabitants of the city of St. Louis are concerned, by a subsequent act passed by the General Assembly of the State of Missouri, entitled an act to revise the

charter of the city of St. Louis, and to extend the limits thereof. This last act was approved March 4, 1870.

The first, and, I think, the main question necessary to be considered in this case is: Did this last mentioned statute repeal the section of the General Statutes under which the prosecution in this case was instituted? In answering this question, if we refer to the elementary writers and adjudged cases on the subject, we will find that certain and well-defined rules have been laid down for our government in such cases. It is not pretended in this case, that the law under which the prosecution was instituted was repealed by any repealing clause in the last named act, or in any subsequent act of the Legislature; but it is admitted, that if it is repealed, it was repealed by necessary implication.

In order to the repeal of a statute by implication the rule is, that the implication must be absolutely necessary, in order that the subsequent statute shall have any effect at all. If both acts can stand, and any effect be given to the subsequent act, which is not inconsistent with the former act, the former act is not repealed. Sedgwick in his treatise on Stat. and Const. Law, 127, uses this language: "It has been said that laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject; and it is, therefore, but reasonable to conclude that the Legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable; and hence a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior law, if the two acts may well subsist together." In our own court this rule has been recognized and followed in several cases. (*Pacific Railroad Company vs. Cass county*, 53 Mo., 17, and cases there cited; see also, *Dwarris on Statutes*, 532, 533, and authorities cited.)

Keeping these rules in view, let us now examine the law of 1870 to revise the charter of the city of St. Louis. By the first section of the third article of said act, which confers

legislative powers on the Mayor and City Council of said city, power is conferred to pass ordinances on a great variety of subjects; among other provisions, are the following: "The Mayor and City Council shall have power within the city, by ordinance, not inconsistent with any law of the State, first, to levy and collect taxes for general or special purposes on real and personal property and licenses," and then, after conferring a number of other specified powers, the act proceeds: "Tenth, to license, regulate, tax or suppress ordinaries, hawkers, peddlers, brokers, pawnbrokers, money changers, intelligence offices, public masquerade balls, street exhibitions, sparring exhibitions, dance-houses, fortune-tellers, pistol galleries, lottery ticket dealers, corn doctors, lock, private and venereal hospitals, museums and menageries, equestrian performances, horoscopic views, lung-testers, muscle developers, magnifying glasses, billiard tables or any other tables or instruments used for gaming, theatrical and other exhibitions, shows and amusements, tippling houses, dram-shops, gift enterprises, and to suppress prize-fighting, coon fights, dog fights, chicken cock fights, gaming or gambling houses, and to regulate or suppress bawdy or disorderly houses, houses of ill-fame or assignation."

We are told, that the language in the last clause of the part of the statute here copied is wholly inconsistent with the law under which the defendant is prosecuted, and necessarily repeals the same. That the language, "to regulate or suppress bawdy or disorderly houses," gives the city the power either to suppress or to regulate, as may be thought best, and that to regulate presupposes a continued and permissive existence of the thing regulated. I admit that the word regulate, as used in the law under consideration, presupposes the existence of the thing regulated, but I deny that it presupposes that such existence is either permissive or legal.

By the charter of the city of St. Louis of 1839, the language used on the same subject was, that the city should have power "to tax, restrain, prohibit and suppress bawdy-houses," etc. In that law the authority to tax certainly presupposed

the existence of the thing to be taxed ; but I suppose that no one will contend, that a legal existence was implied by the authority to the city to tax ; and that therefore the law of the State inflicting penalties on such persons was by implication repealed. I do not think that such a construction in either of the cases would be just to the Legislature. I suppose that the Legislature thought, as was argued by the learned counsel for the defendant, that notwithstanding all of the penalties inflicted by the laws of the State against the vice in question, the evil always had and would continue to exist, and therefore recognizing this fact, authority was given to the city within its limits to regulate, and assist the laws of the State in regulating and restraining the vice, so as, if possible, to modify and not legalize a vice that has always been prohibited and punished, since this country had an existence and wherever civilization prevails.

It is not always safe in construing a statute to take one word used in a single clause thereof, and find the definition of that word, and then attempt to construe the whole law by the particular definition given to that word. We must look to other words employed or used in the law and other clauses of the law relating to the same subject matter and construe them all together, giving each word and clause some meaning, if possible, and we must, in our investigation, see whether words used in one part of the act are used as a qualification of the meaning of other words used in connection with the same subject matter.

In construing the first section of the third article of the charter of the city of St. Louis, passed in 1870, in order to get at its true meaning we must read each separate clause granting legislative power to the city with the first clause of the section prefixed thereto, in the same manner as if the first clause had been repeated at the commencement of each grant of power, or to each subject of power named. To illustrate : In reading the clause which we have been considering we should read : " The Mayor and City Council shall have power within the city, by ordinance not inconsistent with any law

of the State, to regulate or suppress bawdy or disorderly houses, houses of ill-fame or assignation."

The city authorities are here given authority to regulate bawdy-houses by ordinances which are not inconsistent with any law of the State. How, in the nature of things, can this repeal any law of the State? A saving clause is here inserted in the law, for the very purpose of preventing a constructive repeal of the law of the State. The words "regulate or suppress" are qualified and restricted to such regulations as do not conflict with any law of the State, and we have seen that even without any such restriction, if there is anything at all upon which this law can operate, or if it can have any force and the State law stand, then it cannot be construed as a repeal of the former law in force at the time by implication.

The Legislature has said to the city: You may pass ordinances to regulate or suppress bawdy-houses, but in so doing you shall not pass any ordinance which conflicts with or is inconsistent with any law of the State. This leaves no room for repeal by implication. You must look for some method or manner of regulating this evil which will not conflict with the laws of the State, and I insist that many regulations of such houses might be made by the city which would not conflict with the law of the State under which the defendant was prosecuted. The city might enact ordinances prescribing rules requiring the keepers of such houses, under penalties, to close the doors of their houses, and prohibiting them from receiving visitors after a certain hour in the night, or they might be prohibited from keeping any sign over their door or other designation of the character of their house, or the city might by ordinance compel the keepers of such houses to keep a sign or something at their door to designate the character of their house, so that the inmates could be readily avoided by society.

I might name many regulations that could be prescribed by the city for the government of such houses, all of which would be consistent with the laws of the State. And I understand from the rule laid down in the authorities before cited

that when this law can have any effect that is consistent with the law of the State, the State law will not be repealed by implication, even where there is no saving or negative clause in the act.

It has been urged, however, in this case that the first part of section 1 of the third article, of the city charter before referred to, is general in its terms, while that clause giving the city the power to regulate or suppress bawdy-houses is special in its application, and that in such case the special power conferred is to be considered as an exception to the previous general clause. This position might be correct if the facts in the case would justify the application of such a rule; but in this case the rule has no application. This rule can never obtain where the first clause of the act amounts to a limitation or restraint by express terms on the latter clause, and, in the law being considered, both clauses are special. Each relates to the city of St. Louis; one says that the city of St. Louis may exercise certain legislative authority; the other restrains and limits the same authority to the making of ordinances not conflicting with the laws of the State. Each part of the law only applies to the city of St. Louis, the one having no more general application than the other. In such case, how can it be said that the clause of the act conferring the power on the city is an exception to that clause expressly limiting its operation to subjects not inconsistent with the laws of the State? This may be the law, but I must confess that my mind has never been instructed in that school of logic which would enable me to perceive, or understand, the reasoning by which such a result is arrived at.

We are referred, however, to the case of the State vs. Binder, decided by this court (38 Mo., 450), as a case in which the very point being considered in this case was decided in favor of the views taken by the defendant, and as being conclusive on the subject. The defendant in that case was indicted under the law of 1855, which made the selling of any article on Sunday, or the keeping open of any establishment for such sale, an offense which was indictable and punishable

by fine, &c. It was insisted in that case, that the statute under which the defendant was indicted had been repealed so far as it applied to the citizens of St. Louis county (where he was indicted) by a subsequent act of the Legislature, approved March 4, 1857. By this last act it was provided, "that the corporate authorities of the different cities in the county of St. Louis shall have the power, whenever a majority of the legal voters of the respective cities in said county authorize them so to do, to grant permission for the opening of any establishment or establishments within the corporate limits of said cities for the sale of refreshments of any kind (distilled liquors excepted) on any day in the week." There was another section in the act prohibiting the sale of distilled liquors on Sunday, and by the last section of the act all laws and parts of laws conflicting with the provisions of the act were expressly repealed. It was shown in that case, that the city, where the defendant resided, and where the offense was charged to have been committed, had been authorized by the vote of the people required by the law to permit persons to open such establishments on Sunday, and that the city had regularly permitted him to open on Sunday the establishment, for the doing of which he was indicted. It was very properly held in that case, that after the vote of the people had been properly given under the statute authorizing the city to permit the opening of the house on Sunday, and after the city had given the permission, the law, under which the defendant was indicted, was thereby repealed. It will be at once seen that that case had no analogy to the one under consideration. The statute in that case expressly authorized the city, after the vote was given, to permit the very act to be done for which the defendant was indicted. This express provision necessarily repealed the act under which the defendant was indicted. The two acts were in direct opposition to each other, and in such case there is no doubt but the general law is repealed so far as the special case is concerned; but the Legislature did not in that case leave the question of repeal to be decided by construction, but expressly repealed all laws conflicting with the special law.

In the case under consideration, the State law, under which the defendant was prosecuted, was not repealed by any express repealing clause, but, on the contrary, it was expressly provided, that it should not be repealed by implication, by providing in the law, that conferred the power on the city to pass ordinances regulating the avocation of the defendant, that no ordinance should be passed that was in conflict with the law of the State. I cannot therefore see how the case of the State vs. Binder can justly or properly be relied on by the defendant as an authority in her favor. In my judgment the law relied on by the defendant did not confer any power on the city to pass the ordinance relied on by the defendant as a defense to the prosecution against her. I will not attempt a discussion of the questions, raised and so ably argued by the attorneys on the argument of the case, as to the constitutionality of the ordinance passed by the city and relied on by the defendant. I have neither the time nor the ability to do so, nor will I attempt to discuss the policy adopted by the city for the purpose of regulating the evil to which it refers. It may be, that there are some offenses usually prohibited and punished by law, that are so blended and interwoven with human nature that it would be better to adopt some policy by which they could be regulated and controlled, than to attempt to entirely prohibit and suppress them; and it may be that the occupation of the courtesan is one of them. I should be rejoiced to know that some plan had been discovered by which such an evil to society could be mitigated; but with that we have nothing to do in the decision of this case. I have no inclination to enter into a discussion of such a subject on this occasion, my only object being to give a reason, which is at least satisfactory to myself, for reluctantly withholding my assent to the judgment and decision rendered in this case by a majority of the court.

In this opinion Judge Sherwood concurs.

Glenn v. Lehnem.

JOSEPH GLENN AND WILLIAM GLENN, Respondents, vs. DANIEL LEHNEN, Appellant.

1. *Evidence—Admissions—Hearsay, etc.*—In a suit brought on the parol promise of defendant to pay for stock sold to "A.," although one of the plaintiffs testified, that he knew nothing about the contract with the defendant, yet in cross-examination it would be proper to show by him, that on a former occasion he had testified that it was his understanding, that "A." had purchased the stock and that defendant had become his surety. Such testimony was competent as an admission on the part of plaintiff.
2. *Instructions should be predicated on the evidence.*—Instructions should always be predicated on the evidence in the case to which they relate.
3. *Statute of frauds—Original and collateral liability.*—The question whether a verbal contract comes within the Statute of Frauds or not, depends wholly upon the agreement. If a party agrees to be originally bound, the contract need not be in writing; but if his agreement is collateral to that of the principal contractor, or is that of a guarantor or a surety for another, the agreement must be in writing. It is immaterial in such case whether the promise is made prior to the passing or delivery of the consideration or afterwards; in either case the contract must be in writing; and in the latter must have a new consideration to uphold it.

Appeal from Montgomery Circuit Court.

L. Carkener, for Appellant.

I. To enable plaintiff to recover, the exclusive credit must have been given to defendant. (Matson vs. Wharam, 2 T. R. 80; Chit. Cont. 507, 510; Rob. Frauds, 208; Brown, Stat. of Frauds, §§ 197, 198; Cahill vs. Bigelow, 18 Pick, 369; Cutler vs. Hinton, 6 Rand., 509; Elder vs. Warfield, 7 Har. & J., 391; 1 McCord, 100; Rogers vs. Kneeland, 13 Wend., 121; Leonard vs. Verdenburg, 8 Johns., 37.)

II. The idea that because a promise is made before the sale or delivery, it is therefore an "original" one, is exploded. (Story Cont., § 861; Matson vs. Wharam, *supra*; Chit. Cont., *supra*; Mathews vs. Milton, 4 Yerger, 576; Leland vs. Creyon, 1 McCord, 100.)

M. Kinealy, with J. M. Barker, for Respondents.

I. Plaintiffs delivered the property to Clarkson solely on the faith and credit of defendant's parol promise "to be responsible for the price or to see it paid." They are entitled to recover. This was the fact, and is the law of the case.

(Proprietors, &c. vs. Abbott, 14 N. H., 157; Arbuckle vs. Hawks, 20 Vt., 538; Perley vs. Spring, 12 Mass., 297.)

II. The promise of defendant was not within the statute, for the reason that there was no debt at the time to which the promise could be collateral. (Mallory vs. Gillett, 21 N. Y., 412.)

VORIES, Judge, delivered the opinion of the court.

This action was brought by the respondents against the appellant before a justice of the peace.

The action was brought on an account for the price of a steer, which was stated to be \$53.55, but which had been reduced by payments credited thereon, so that the balance claimed was \$26.85.

The plaintiffs recovered a judgment before the justice for the amount claimed. From this judgment the defendant appealed to the Montgomery Circuit Court, where judgment was again rendered against him.

On the trial in the Circuit Court, the plaintiff, Joseph Glenn, was examined as a witness on the part of the plaintiffs, and testified, that some time previous to the first of May, 1871, one Jesse B. Clarkson came to him, and wished to buy the steer mentioned in the account sued on; that he offered to sell Clarkson the steer for 5 and 1-4 cents per pound; that Clarkson desired to purchase the steer on time, and pay for him after he had been butchered and sold. This was refused, and Clarkson was told that he must either pay cash or give security. A short time after this, Clarkson returned and said he had made arrangements to secure the money, and wanted the steer; but he did not take the steer at that time, but returned the third time and told plaintiff, that Mr. Lehnem (the defendant) had agreed to become his surety for the payment of the money, after which the steer was driven up and put in plaintiff's lot.

This evidence on the part of plaintiffs of the conversation with, and statements of, Clarkson, was objected to at the time by defendant, on the ground, that Clarkson was no party to

the suit, and his statements and contracts were not admissible in evidence against defendant, and that said evidence was irrelevant and incompetent.

The court overruled the defendant's objection, and admitted the evidence, and the defendant excepted.

The witness then proceeded to state, that Clarkson told him that Lehnem wished to see him at his house about the steer; that witness then went to Lehnem's house; that the first thing said to witness by Lehnem was: "I want to see about buying that steer." Witness asked him "what about it?" He said he wanted Clarkson to get the steer, as Clarkson was going to butcher some Texas cattle that he (Lehnem) had, that were not then fit to kill, and that he wanted Clarkson to get something to commence on to prevent another butcher from getting the control of the market. Witness then told him "if he would see the money paid, Clarkson could have it; but that he could not have it on his own responsibility. He said "all right, let him have it, and I will see it paid for."

The witness further testified, that, after this conversation with defendant, the steer was delivered to Clarkson, or taken from the lot and taken to the stock-yard to be weighed, and that defendant came to the stock-yard and assisted in weighing the steer and taking him off; that something was said by defendant at his house about his never signing a note for any one, when witness told him he did not want him to sign a note, that his word was sufficient.

On cross-examination, witness was asked by the defendant "whether in the conversation with Lehnem at the house of the latter anything was said about when, where, or to whom, the steer was to be delivered?" The witness refused to answer the question further than to say, that he had told all he had to tell about it, and had told all he knew about it.

The defendant's counsel asked the court to require the witness to answer the question; but the court refused so to do, to which ruling the defendant excepted.

The witness stated, that he had collected part of the price of the steer from Clarkson; but that he did so at defendant's request.

William Glenn, the other plaintiff in the case, was also examined as a witness. On his cross-examination he stated that he knew nothing about the contract with Lehnem, except what his brother, Joseph Glenn, had told him; that he was present, and testified on the trial before the justice of the peace. Witness was then asked, whether he did not, in his testimony on such trial, state; that "it was his understanding, that Jesse B. Clarkson bought the steer, and that the defendant became his security for the price of the same."

The plaintiffs' counsel objected to the question on the ground, that as the witness did not know of his own knowledge what the contract was, the evidence was hearsay and incompetent. The objection was sustained by the court, and the question excluded, to which the defendant at the time excepted.

The defendant was examined as a witness in his own behalf, and contradicted in direct terms the evidence of plaintiff in reference to the contract or agreement by him to pay for the steer; denied that he ever agreed to become liable for the steer, either as Clarkson's surety or otherwise; but said, that he had positively refused to become so liable; admitted, that he had told Joseph Glenn, that he was purchasing hides of Clarkson and sometimes traded with him, and that, if he could assist plaintiffs in any way in collecting the price of the steer from Clarkson, he would do so.

The defendant introduced other evidence tending to prove, that the steer had been sold to Clarkson, and that plaintiffs had purchased beef of Clarkson at different times at his butcher shop, and had credited the account for the price of the beef on their account for the steer.

After the close of the evidence the court instructed the jury as follows First—"If the jury believe from the evidence, that the steer was delivered on defendant's promise alone to pay therefor, then the promise was not collateral, but original, and not within the statute of frauds, and they will find for the plaintiffs." Second—"If the jury find from the evidence in the cause, that the sale of the steer in ques-

tion was made by plaintiffs to Clarkson, and the animal delivered in accordance with such sale, no subsequent agreement or understanding by defendant, not in writing, to be responsible for the price of said steer, is binding on defendant." Third—"If the jury find from the evidence in the cause, that plaintiff sold the steer to Clarkson, and let him have the steer on his own credit and responsibility, a verbal promise by defendant to be responsible for said steer, if such were made, is not binding in law on defendant, and the verdict should be for the defendant." Fourth—"If the jury believe from the evidence in the cause, that Clarkson offered to buy the steer in question, of plaintiffs, at a certain price, and that plaintiffs declined to sell the same unless paid for or secured, and that before the offer aforesaid was accepted, defendant promised plaintiffs to be responsible for the price of said steer, and that the steer was afterwards delivered to Clarkson in defendant's presence on the faith of said promise of defendant, and without such promise plaintiffs would not have let said Clarkson have said steer, then the jury should find for the plaintiffs." Fifth—"If on the other hand, the jury believe from the evidence in the cause, that the plaintiffs let said Clarkson, upon his offer to buy, have said steer without any previous promise by the defendant to plaintiffs, or either of them, to pay, or to be responsible for, the price of said steer, or to see it paid, and without any other promise or assurance to plaintiffs, or either of them, than that he would help plaintiffs to get the price of said steer from said Clarkson in case they let him have the steer, then the verdict should be for the defendant."

The defendant at the time objected to each of these instructions; but the court overruled said objections, and gave the instructions, and the defendant excepted.

The defendant then asked the court to instruct the jury as follows: First—"Unless the jury believe from the evidence, that the plaintiffs sold the steer, mentioned in the account sued upon, to the defendant, the plaintiffs cannot recover." Second—"If the jury find from the evidence, that the plaintiffs

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sold the steer to Jesse B. Clarkson, and that defendant promised to be security for the price thereof, then the plaintiffs cannot recover in this action, unless the jury further find, such promise was in writing."

The court refused to give each of these last instructions, and the defendant again excepted. The jury then found a verdict for the plaintiffs for the amount claimed by the account sued on.

The defendant in due time filed a motion for a new trial, setting forth, as reasons therefor, the opinions and action of the court excepted to.

The court overruled said motion, and rendered final judgment on the verdict, and the defendant again excepted, and appealed to this court.

The first question presented for the consideration of this court is, as to the propriety of the action of the Circuit Court in admitting the witness, Joseph Glenn, to detail in evidence the conversations of plaintiffs with Jesse B. Clarkson, and his statements made to plaintiffs in reference to the defendant's agreement to go his security for the price of the steer. It is contended by the appellant, that this evidence was incompetent; that Clarkson was no party to the suit, and stood in no relation to the defendant that would justify the court in receiving his statements in evidence against the defendant.

The position of the defendant is right, if the evidence was admitted for the purpose of binding the defendant or of fixing his responsibility to the plaintiffs for the price of the steer sold; but it seems, that this evidence was only detailed by the witness for the purpose of showing, that the plaintiffs had refused to sell the steer to Clarkson on his own responsibility, and as preliminary to the conversation had with defendant, and while the statements of Clarkson were not strictly legal evidence, it cannot be seen how what was detailed could injure the defendant. This court would not, therefore, reverse the judgment for that reason, if there were no other errors in the record.

It is also insisted by the appellant, that the Circuit Court

erred in sustaining the objection of the plaintiffs to a question by the defendant to William Glenn, who was examined as a witness in the cause. This witness was one of the plaintiffs; had testified, that he knew nothing about the contract with defendant, except what his brother and co-plaintiff had told him. He also stated, that he had been examined as a witness upon the trial of the case before the justice of the peace. The defendant then, in the cross-examination of said witness, asked him if he had not testified before the justice, that it was his understanding that Jesse B. Clarkson bought the steer, and that the defendant became his security for the price. This question was objected to by the plaintiffs on the ground, that the evidence was hearsay and incompetent.

The objection was sustained, and the question excluded, and no answer permitted thereto.

This was clearly wrong. It was certainly material to know what understanding of the contract he had got from his brother and co-plaintiff, at or near the time the transaction took place, and in a case like this, where the evidence is conflicting, the question might become important in order to test the memory of the witness, or to contradict him if answered in the negative. It certainly cannot be said, that the admissions or statements of a party to an action in reference to the matters in controversy is hearsay evidence.

This might dispose of the case; but as it will be remanded for another trial, it is proper that we should briefly notice the exceptions of the defendant to the opinions of the Circuit Court in giving and refusing instructions to the jury.

By the first instruction given by the court, the jury are told, that if the steer was delivered to Clarkson on defendant's promise alone to pay therefor, that then the promise was not collateral and need not be in writing. To this instruction there can be no valid objection.

By the second instruction, the court tells the jury, that if the steer was sold by plaintiffs to Clarkson and delivered to him in conformity to such sale, no subsequent agreement or understanding by defendant, not in writing, to be responsible

for the price of the steer, is binding on the defendant. This instruction is abstractly true; but it is insisted, that it was calculated to mislead the jury, and was not authorized by any evidence in the case.

Instructions should always be predicated on the evidence in the case to which they relate.

In the case under consideration, there is no pretense in the evidence or otherwise, that any promise or agreement was ever made by the defendant to pay for the steer, either primarily or collaterally, subsequent to the time it was delivered to Clarkson, and therefore it was wholly unnecessary to instruct the jury as to the effect of such a promise. Whatever promise was made by the defendant to pay for the steer, if he made any, was admittedly made before the delivery of the steer, so that the instruction could only have the effect to mislead the jury into the belief, that if the promise of the defendant had been made before the delivery of the steer to Clarkson, he would be liable to pay for the steer, whether his contract was to be considered as an original undertaking or only collateral to the obligation of Clarkson, or in other words, that if the contract or promise had been made before the delivery of the steer, it was therefore necessarily an original contract.

There was evidence in the case tending to prove, that plaintiffs had treated Clarkson as their debtor for the price of the steer, and had been attempting to collect the debt from him, and trying to induce him to give security for its payment; but these facts, which were relied on by the defendant to show that his agreement or promise, if any, was collateral to the promise of Clarkson, who, he contended, was the original debtor, were wholly ignored by the instructions of the court; the court seeming to hold, that if the promise of defendant preceded the delivery of the steer to Clarkson, it could not be collateral, and was not affected by the statute of frauds and perjuries.

It seems to be well settled, that whether a contract comes within the provisions of the statute or not, depends wholly on

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the agreement. If a party agrees to be originally bound, the contract need not be in writing; but if his agreement is collateral to that of a principal contractor, or is that of a guarantor or security for another, the agreement must be in writing.

It makes no difference in such case, whether the promise is made prior to the passing or delivery of the consideration or afterwards. If it is made before and is a part of the original contract that the guaranty shall be given, then the original consideration for the contract will be sufficient to uphold the guaranty; but if the guaranty is made after the original contract has been fully executed, then the guaranty must have a new consideration to uphold it; but in either case the contract must be in writing. (Story Cont., § 861; Cahill vs. Bigelow, 18 Pick., 369; Rogers vs. Kneeland, 13 Wend., 114; Leonard vs. Vreedenburg, 8 John., 29; The Proprietors, &c. vs. Abbott, 14 N. H., 157.)

The defendant asked the court by second instruction to tell the jury, that if the plaintiffs sold the steer to Jesse B. Clarkson, and if the defendant promised to be security for the price thereof, then the plaintiffs could not recover, unless the promise was in writing.

If this instruction had been given in connection with the second instruction given by the court, the jury could not have been misled by said instruction; but it was refused by the court, and the jury left to infer, that if the promise was made by the defendant before the delivery of the steer, that it was necessarily binding.

By the fourth instruction given by the court, the jury were told, that if plaintiffs declined to sell the steer to Clarkson unless the price was paid or secured, and that before the plaintiffs accepted Clarkson's offer to purchase, the defendant promised plaintiffs to be responsible for the price of the steer, and that the steer was afterwards delivered to Clarkson in defendant's presence on the faith of said promise of defendant, and that without such promise plaintiffs would not have let Clarkson have the steer, then the jury should find for the plaintiffs.

This instruction at first view would seem to be correct; but upon examination it will be found to be objectionable; it is also calculated to mislead, ignoring one main ground of the defendant's defense.

It may be true, that defendant promised to be responsible to plaintiffs for the price of the steer, and that the promise was made before the delivery of the steer to Clarkson, and that plaintiffs would not have delivered the steer without defendant's promise, and yet, the defendant may only have promised as surety for Clarkson, in which case the plaintiffs could not recover against the defendant, unless his promise was in writing.

There was evidence tending to prove this supposed state of facts, and it ought not to have been wholly overlooked in an instruction which seems to be intended to govern the entire case.

The jury are told in the last instruction given by the court, that if the defendant made no other promise than that he would assist to collect the money from Clarkson, that the verdict should be for the defendant. This does not help the instruction.

The jury ought to have been told, that if defendant's promise was only a promise as surety or guaranty for the debt of Clarkson, that it was within the statute and the plaintiffs could not recover. The evidence strongly tended to prove, that plaintiffs looked upon Clarkson as their debtor for the steer, and upon the defendant as security. And this view ought to have been presented to the jury by a proper instruction, or the defendant's second instruction given.

There were other exceptions taken to the action of the court by the defendant, both as to the admission of evidence, and as to the instructions, but it is not deemed necessary to give them any further notice in this opinion.

Judge Sherwood absent. The other Judges concurring, the judgment is reversed and the cause remanded.

JOSIAH CALDWELL, Plaintiff in Error, *vs.* JOSEPH FEA, *et al.*,
Defendants in Error.

1. *Justices' Courts—Judgment—Execution—Motion to quash, etc.*—The entry on a justice's docket, showed suit brought against Fea, Brother & Turnbull, and judgment against defendants "as a firm, or against Joseph Fea and William Turnbull, as the summons was served on them personally." The execution issued under it recited a judgment and ordered a levy against the three defendants. *Held*, that although the judgment bound only the two defendants named, yet under the statute (W. S., 839, § 15), the execution should not be quashed, but should be amended, so as to conform its recitals to the law, and should be directed against the defendants, who had been personally served.

Error to Washington Circuit Court.

G. J. Van Allen, for Plaintiff in Error.

Reynolds & Relfe, for Defendants in Error.

SHERWOOD, Judge, delivered the opinion of the court.

This case comes up here in consequence of the court below sustaining a motion to quash an execution issued on the transcript of a judgment of a justice of the peace.

The action before the justice was entitled Josiah Caldwell *vs.* Fea, Brother & Turnbull, as shown by the justice's docket, which recites the filing of an account for \$50 on the 16th day of November, 1872, the issuance of a summons, returnable on the 2nd day of December next following, the rendition of a judgment by default against the three defendants, "as a firm," "or against Joseph Fea & William Turnbull, as the summons was served on them personally, 16th day of November, 1872, December 2, 1873, and that execution issue therefor: Execution issued, December 18th, 1872, March 1st, 1873, no goods or chattels found. Transcript filed, March 7th, 1873."

There were two transcripts filed by the justice, the first on the last mentioned date, and the second on the 29th of the same month. Both transcripts follow the recitals of the docket in every respect, except that the second transcript shows of whom the firm of Fea, Brother & Turnbull was composed, recites a judgment by default only against Joseph Fea and William Turnbull, directs the issuance of an execu-

tion to the constable (naming him) to run for 60 days, and states, that such execution was, March 1st, 1873, by the constable, (naming him,) returned no goods or chattels found, but does not state at what time the execution issued, while the first transcript shows, that the execution issued December, 1872, to run 60 days, and was returned March 1st, no goods or chattels found, and recites the judgment by default against the defendants as a firm, or against the two defendants, who are mentioned in the justice's docket as having been personally served.

The execution, sought to be quashed, recited a judgment recovered before the justice by Josiah Caldwell against Thomas Fea, Joseph Fea and William Turnbull, composing the firm of Fea, Brother & Turnbull, on the 2nd day of December 1872; the issuance of an execution on that day, the return of the same March 1st, 1873; no goods and chattels found by the constable to whom the same was directed, as appeared by the transcript of the justice, filed the 29th day of March, 1873, in the office of the clerk, and directed the sheriff to levy the debt of the goods, chattels and real estate of the said Thomas Fea, Joseph Fea and William Turnbull.

The grounds of the motion to quash were: that there was no such judgment as set forth in the execution; that the defendants were not served with process and did not appear; that the execution issued by the justice did not run 60 days, nor did the constable wait that length of time before returning the execution, and that the transcript filed did not show the issuance and return of an execution.

It is against the whole policy of our law, as well as the express provisions of our statute, to scan too narrowly, and scrutinize too closely, proceedings before justices of the peace.

Section 15, p. 839, 2 W. S., provides, "No judgment rendered by a justice of the peace shall be stayed, or in any way affected, by reason of any informality in entering such judgment or other entry required to be made in the docket."

It was obviously improper for the magistrate to render judgment against the firm to which the defendants belonged;

but this impropriety on his part did not at all invalidate the judgment as to the two defendants who were served with process; and that they were thus served on the 16th day of November, 1872, sufficiently appears, notwithstanding that date was immediately followed by that of "December 2nd, 1872." And it also appears with sufficient clearness, that the execution issued by the justice was made returnable in sixty days, and was not returned until after the expiration of that length of time, and with such a return indorsed thereon as authorized the issuance of an execution by the clerk of the Circuit Court upon the filing of the transcript.

It was perfectly competent therefore, for that court to disregard the blunders and inaccuracies of the justice's entries, and to amend the execution issued by its clerk, so that it should conform to the facts patent of record, and be directed only against those defendants who had been served with process. And this is the course which should have been pursued, instead of quashing the writ, as it was evident upon examination of the docket of the justice, and the transcripts filed by him, that the law, so far as concerned the defendants served, had been substantially complied with. (*Jeffries vs. Wright*, 51 Mo., 215.)

The judgment is reversed and the cause remanded. The other Judges concur.

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**MARSHAL N. SMITH, et al., Defendants in Error, vs. THE
COUNTY OF CLARK, Plaintiff in Error:**

1. *Bonds, railroad—Coupons—Suit on, in U. S. Courts—Jurisdiction—Aggregate amount.*—In suit to recover coupons on railroad bonds issued by a County Court, the question, whether the amount sued on is sufficient to bring it within jurisdiction of the Circuit Court, is to be determined by the aggregate amount of the coupons.
2. *Railroad bonds—Coupons—Negotiability of.*—Railroad coupons are not rendered non-negotiable by the fact that they are not made payable to a particular person.
3. *Bonds—Railroad—County—Subscription—Popular election—Subscription, right of, a franchise—Repeal of special by general law—Bonds, recitals in—Innocent holder—Estoppel, etc.*—Section 14 of the North Mo. R. R. Charter of 1851 authorized counties along the line of the road to subscribe thereto, without the sanction of a popular vote. Section 10 of the act of 1857, creating the Alexandria & Bloomfield Railroad Company, (Sess. Acts 1856-7, p. 94,) made said section 14 a part of the latter charter. *Held,*
 - 1st. that the right of subscription, conferred by section 14, was not exclusively that of the counties, but was a privilege of the railroads, and might be transferred, by section 10 aforesaid, to the A. & B. R. R. Co.
 - 2nd. That bonds issued in 1865 by the County Court of Clark county, in aid of the A. & B. R. R. Co., under the authority conferred by the charter of 1857 were valid notwithstanding the inhibition of the act of March 23rd, 1861 (Sess. Acts 1861, p. 60, § 1.) The last named, being a general act, did not repeal the former and special one.
 - 3rd. Although said bonds on their face recited, that they were issued under the general act for the formation of railroads, passed in 1855, and that act, as amended by the acts of 1860 and 1861, required a popular vote to authorize the issue of the bonds, such recitals would not estop an innocent holder from showing, that, in point of fact, the bonds were issued under the special act of 1857.

PER NAPTON, JUDGE.

4. *Bonds, county—Railroad—Bona fide holder—Popular vote—Recitals as to—Defenses.*—The act of 1855, and the amendments thereto, required a popular vote to authorize the issue of Clark county railroad bonds; and the bonds recited, that they were issued as authorized by the act. *Held,* that the holder would have a right to presume, that the acts had been complied with; and in suit on the bond, by a *bona fide* holder without actual notice of the facts, the defense, that no such popular vote had been taken, would be unavailing.

ON MOTION FOR REHEARING.—PER CURIAM.

Held, that the recitals of the bonds would not be conclusive upon the county as to the fact of the election.

5. *Bonds county—Railroad—Legal existence of Railroad—Issue as to, not to be raised collaterally—Quo Warranto, etc.*—In suit on a bond given by a County Court in aid of a subscription for a railroad, the question, whether the corporation had a legal existence, cannot be raised. The only proper way to test this question would be by *quo warranto* on the part of the State.

Error to Lewis Circuit Court.

Edward Higbee, for Plaintiff in Error, contended, among other things, that the power vested in the County Courts to subscribe stock in the North Mo., and the Alexandria and Bloomfield Railroad, was not a franchise of the companies, and that the bonds issued in aid of such subscription were void, and cited *Aspinwall vs. Davies County*, 22 How., 364.

Jas. Hagerman, for Defendants in Error.

I. The Circuit Court had jurisdiction. There are seven counts in the petition. The aggregate amount sued for determines jurisdiction, and not the amount of each coupon. (*Langham vs. Boggs*, 1 Mo., 477; *Barns vs. Holland*, 3 Mo., 47; *Martin vs. Chauvin*, 7 Mo., 277; *Judson vs. Macon County, Wes. Dist. Mo.*, April term, 1873, U. S. C. C.)

II. The coupons sued on are negotiable. They mention no payee, yet have the same legal effect as if expressly made payable to bearer. The bonds are payable to the company or bearer. The plaintiffs purchased the bonds and coupons at the same time. In *Johnson vs. County of Stark*, 24 Ill., the court holds a coupon, similar in every respect to those sued on, negotiable by delivery only. (*McCoy vs. Washington county*, Am. Law Reg., February, 1859; 21 How., 539; 2 Abbott, Nat. Dig., 44; *Thompson vs. Lee county*, 3 Wall., 332.)

III. The plaintiffs are innocent purchasers for value, before maturity, of the bonds and coupons in controversy. The only inquiry therefore, in this case is, "had the County Court of Clark county the power to issue them?" (*Steines vs. Franklin county*, 48 Mo., 167; *State vs. Saline county*, 48 Mo., 390.)

IV. The County Court of Clark county had the power to subscribe to the capital stock of the Alexandria and Bloomfield Railroad Company, and to issue bonds of the county, in payment of such subscription without first taking the sense of the voters. Section 14 of the charter of the North Missouri Railroad Company, adopted by the Alexandria and Bloomfield Railroad Company, authorized the County Court to subscribe to its capital stock without first taking a vote.

The general law of 1855, (1 R. C., p. 427, § 30,) and the amendments thereto in 1860, (Acts 1860, p. 88, § 1,) and in 1861, (Acts 1861, p. 60, § 1,) did not repeal these sections. Each of these statutes must be construed to operate prospectively, and not retrospectively. (State vs. Macon county, 41 Mo., 453; State vs. Sullivan county, 51 Mo., 522; State vs. Nodaway county, 47 Mo., 349; 48 Mo., 339.)

The irresistible conclusion, from the reasoning of the court in these cases, is, that the law of 1855, and the amendments of 1860 and 1861, did not repeal similar provisions in special charters.

V. "All the privileges, rights and immunities, of the North Missouri Railroad Company were undoubtedly conferred on the Alexandria and Bloomfield Railroad Company, as fully as if same had been re-enacted" in its charter. (Han. & St. Jo. R. R. Co. vs. Marion county, 36 Mo., 295; State vs. Sullivan county, *ante*; Binghampton Bridge Case, 3 Wall., 52.)

The record in this cause will warrant the statement, that the bonds in controversy were negotiated and purchased on the faith of that decision. Neither the people in their sovereign capacity, the Legislature, nor the judiciary, can alter this construction so as to effect rights acquired under it. (Gelpcke vs. City of Dubquue, 1 Wall., 175; 3 Wall., 303; State vs. Miller, 50 Mo., 129.)

The power to subscribe was given to the County Courts, but "the right" to receive the subscription attached to the company. Other corporations engaging in their enterprises were compelled to depend upon subscriptions of private individuals. They could have no other stockholders. This company was granted "the privilege," not enjoyed by others, of having these political subdivisions of the State, counties, become its stockholders. With section 14 the charter of the North Missouri Railroad Company was valuable from the day it was granted. Without that section it was valueless and would not have been accepted by its incorporators. The power of the counties to subscribe was a "right," "a privilege," and an "immunity." It was a part and parcel of the fran-

chise itself; and by section 10 of its charter the Alexandria and Bloomfield Railroad Company acquired it.

VI. If the County Court had the power to subscribe without an election, the recital on the face of the bonds, that they were issued pursuant to the general law of 1855, did not effect the power. The recital was unnecessary, and was wrong in fact, and should be treated as surplusage. (*Crane vs. Lessee of Morris*, 6 Pet., 598; *Nodaway county case*, *ante*).

VII. Under the law, as expounded by the Supreme Court of this State at the time these bonds were issued, they were valid in the hands of innocent purchasers, although the power of the County Court to issue them existed only under the general law then in force, which required an election. (*Flagg vs. City of Palmyra*, 33 Mo., 440; *Han. & St. Jo. R. R. Co. vs. Marion county*, 36 Mo., 294; *Platte county case*, 42 Mo., 171; *Barret vs. Schuyler county*, 44 Mo., 197; *Steines vs. Franklin county*, 48 Mo., 167.)

VIII. If the Legislature authorized the County Court to subscribe after an election, and the bonds were issued without an election, the innocent purchaser can recover. This is the settled doctrine of the Supreme Court of the United States. (*Pendleton county vs. Amy*, 13 Wall., 298; *Commissioners Knox county vs. Aspinwall*, 21 How., 539; *Bissell vs. City of Jeffersonville*, 24 How., 287; *Moran vs. Commissioners of Miami county*, 2 Black., 722; *Meyer vs. Muscatine*, 1 Wall., 384; *Van Hortrup vs. Madison City*, 1 Wall., 291; *Supervisors vs. Schenck*, 5 Wall., 772; *Lexington vs. Butler*, 14 Wall., 283; *Grand Chute vs. Winegar*, 15 Wall., 355.)

NAPTON, Judge, delivered the opinion of the court.

This suit was brought in August, 1867, on seven coupons, detached from bonds, dated January 1, 1865, due in twenty years, and payable to the Alexandria and Bloomfield Railroad Company or bearer. The bonds are in these words:

"\$500. United States of America. No. 51. Alexandria and Bloomfield Railroad Company, county of Clark, State of Missouri; bond due in twenty years from date. Know all

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men by these presents, that there is due from the county of Clark to the Alexandria and Bloomfield Railroad Company, or bearer, five hundred dollars, lawful money of the United States, with interest at the rate of seven per cent. per annum, payable annually on the first day of each year, at the treasury of said county of Clark, on the presentation and surrender of the annexed coupons; the principal to be due and payable twenty years after the date hereof; for the performance of all which the faith of the said county of Clark is irrevocably pledged, as also the property, revenue and resources of the said county of Clark. This bond being issued and pursuant to orders of the county court of Clark county, as authorized by an act of the legislature of the State of Missouri, entitled "An act to authorize the formation of railroad associations and regulate the same," approved December 13, 1855. In testimony whereof the said county of Clark has executed this bond by the presiding justice of the county court of Clark county, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same and affixing the seal of said court. This done in the town of Waterloo, county of Clark aforesaid, this, the first day of January, 1865.

HARVEY SEYMOUR,

Presiding Justice of County Court of Clark County.

Attest: G. M. OCHILTREE,

Clerk of the County Court of Clark County."

Coupons are as follows:

"State of Missouri. Bond No. 51. \$35. The county of Clark will pay thirty-five dollars on this coupon on the first day of January, 1867, at the treasury of said county.

G. M. OCHILTREE,

Clerk of the Clark County Court."

The petition states, that the coupons due in 1866 were paid, but that the coupons sued on, due in January, 1867, were not paid, although duly presented. There were separate counts on the seven coupons sued on. The answer denies that said bonds were issued in conformity to the law of De-

ember 13, 1855, asserts that no vote of the qualified voters of the county authorized the issue of the bonds for \$50,000.

After a trial and a multiplicity of pleadings and a change of venue, the case was finally determined in the circuit court upon an agreed state of facts, which were substantially these :

1. That the A. & B. R. R. Co. was incorporated by the act of February 9, 1857, and subsequently, to-wit, on the 17th of September, 1864, duly and legally organized.

2. It is admitted that sections 8, 9, 10, 11, 14, and 19 of the act incorporating the N. M. R. R. Co. (approved March 13, 1851,) were on the 17th of September, 1864, specially adopted by said A. & B. R. R. Company.

3. That after the organization of said company, to-wit : On the — day of — 1864, the following entry was made on the books of said company : "We, the undersigned judges of Clark county, do subscribe \$200,000 to the A. & B. R. R. Co., payable in county bonds, due in twenty years, at seven per cent. per annum, for said county of Clark, State of Missouri.

"Harvey Seymour, B. P. Hannan, Jacob Tinsman : Number of shares, \$20,000 : amount, \$200,000."

That said H. Seymour and B. P. Hannan signed the same at Luray in said county, and Tinsman at his residence during the vacation of the county court.

4. That afterwards, to-wit : On the — day of —, by an order of said county court, duly entered of record, the question, as to whether said county should subscribe 200,000 dollars to the capital stock of the A. & B. R. R. Co., was submitted to the resident qualified voters of said county, to be voted upon at the general election for State and county officers, held on the first Tuesday of November, 1864, at which said election a majority of the resident voters of said county voted not to subscribe said sum ; that afterwards, to-wit, on the 6th day of June, 1865, the said county court, by its order duly entered of record, having ordered the same, a special election was held for the purpose of voting upon the

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question submitted to the resident voters of said county, as to whether said county would subscribe 100,000 dollars to the capital stock of said company, at which election a majority of the resident voters of said county voted not to subscribe said sum.

5. That afterwards, to-wit: On the 10th day of June, 1865, and at the dates subsequently as the same appear in the transcript from the records of said county court hereto attached marked "A" and made a part hereof, the said county court made the order, as in said transcript set forth; that on the said 10th day of June, and in pursuance of said order of that date, the county court issued and delivered to the A. & B. R. R. Co. one hundred \$500 negotiable bonds with twenty interest coupons thereto attached to each of said bonds, of which exhibit "B," herewith filed, is admitted to be a copy, each coupon for the sum of \$35; said bonds payable to said company or bearer, of which the bonds and coupons described in plaintiffs' petition and the coupons sued on were a part; that said bonds were dated January 1, 1865; that afterwards J. H. Crane, the duly authorized agent of said railroad company, before the maturity of said bonds and coupons sued on, for a valuable consideration sold, transferred and delivered the said bonds and coupons to plaintiffs, who were then partners, doing business under the firm name and style of Smith & Hall, who received said bonds and coupons in good faith, without actual notice of any defects in their issue, and upon the representations of said Crane, that said bonds and coupons were issued to said company in payment of subscription of said county of Clark to the capital stock of said company; that the bonds and coupons now belong to plaintiffs, and are due and unpaid.

6. It is admitted, that in pursuance of the order of the county court, authorizing him so to do, as the same appears in the exhibit hereto attached, marked ("A,"), G. M. Ochiltree was present at an election held by said railroad company for the election of its officers, on the first Monday of May, 1866, and as the agent of said county cast the vote of said

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county, in which he represented and cast 500 votes for and on behalf of said county, which said votes represented \$50,000 stock of said company.

7. It is admitted that the first annual, and a large proportion of the second annual instalment, of coupons on the bonds described in plaintiffs' petition were paid by the said county on the presentation of said coupons at the county treasury; that the coupons sued on were presented to the county treasury on the 28th of March, 1867, and payment demanded, and payment was refused, as will be shown by reference to indorsements on the back of said coupons. The coupons sued upon were made part of this statement.

Signed by Hagerman, attorney for plaintiffs, and Lipscomb & Anderson, for defendant.

The order of the county court, referred to in the foregoing agreement, is as follows: "Whereas, heretofore, on the — day of —, 1864, the county court of Clark county entered into a certain obligation to and with the A. & B. R. R. Co. by signing the books of said company and subscribing \$200,000 to said company's stock, by which obligation the county became liable to a prosecution for the said sum of \$200,000; therefore, it is ordered by the court, that the county of Clark issue the sum of \$50,000 in seven per cent. bonds, payable twenty years from date, interest payable annually, which is to be received by said A. & B. R. R. Co. in full satisfaction for the adjustment of said former liability, said bonds to be placed in the hands of the county treasurer, to be by him paid out to said A. & B. R. R. Co., as other subscriptions are by the rules of said company required to be paid."

Section 14 of the North Missouri Railroad charter, which is incorporated in that of the A. & B. R. R., as authorized by section 10 of its charter, reads as follows:

"14. It shall be lawful for the county court of any county, in which any part of the route of said railroad may be, to subscribe to the stock of said company," &c.

Section 10 of the A. & B. R. R. charter (Feb. 9, 1857,) is as follows:

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"Said company shall in all things be subject to the same restrictions and entitled to all the privileges, rights and immunities, which were granted to the North Missouri Railroad Company by an act entitled 'an act to incorporate the North Missouri Railroad Company,' approved March 3, 1851, so far as the same are applicable to the company hereby created, as fully and completely as if the same were herein re-enacted."

Various declarations of law were asked, but the plaintiff had a judgment on the facts agreed.

A question is raised here whether the Circuit Court had jurisdiction, on the ground, that each count declared on a coupon for \$35, which is a sum below the jurisdiction of the Circuit Court. The aggregate of the coupons sued on is admitted to be within that jurisdiction. In the United States courts the amount of \$500 is essential to confer jurisdiction. The aggregate of the coupons sued on has been always impliedly or expressly assumed there as determining the question of jurisdiction. The point was expressly decided by Judge Dillon at the spring term of the Circuit Court in Jefferson City. We know of no decisions in our courts to the contrary.

Another point made is, that the coupons in this case, not being made payable to any particular person, are not negotiable. That point is decided in *McCoy vs. Washington county*, 1 Wal. Jr., 381.

It is apparent from the agreed statement in this case, that the main and important question in it is, whether the court had the authority to issue the bonds in question under the act of 1857, which was the charter of the company, or whether the recitals in the bonds, that they were issued under the General Statutes of 1855, were obligatory, and therefore that the failure to call an election, which the recited act requires, vitiates the bonds.

The ground on which the Circuit Court decided the case was, that the charter of the company authorized a subscription without a vote, and we will examine that point first.

The charter of the A. & B. R. R. Co. was passed in 1857.

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It was enacted, that the company should be entitled to all the privileges, rights and immunities, which were granted to the N. M. R. R. Co., as fully and completely as if the same were re-enacted in their charter.

The charter of the N. M. R. R. Co. contained a provision that the county courts of any county, in which any part of the road passed, might subscribe to the stock.

It is objected that the right of subscription granted to the counties on the line of the N. M. R. R. is not a privilege or immunity of the railroad company, but of the counties, and is therefore not transferred to the A. & B. R. R. Co. The section (14) conferring this power, as it appears from the agreed statement of facts, was expressly adopted by the A. & B. R. R. Co. It was undoubtedly the intention of the legislature to give to this last named company the same privileges that had been granted to the former. The county court had no power to subscribe to the stock of railroad corporations without a special authority from the legislature, either express or implied. The power thus conceded to the courts or other municipal bodies may well be termed a privilege to the corporations, and we see no substantial objection to a transfer of such a privilege by simply, in general terms, embodying the section of the original act, which granted it, into the new law. That such was the intention of the legislature, and of the railroad company, is clear, and if the word "privilege" admits of the narrow construction claimed, the practical construction it has received in this State, as may be seen by reference to the decisions of our courts, would preclude any inquiry into the subject now. These provisions were the principal means by which this and other roads were built, and without them the charters would have been of no value. (*Hannibal and St. Jo. Railroad Co. vs. Marion county*, 36 Mo., 294.)

The important question, however, remains: Whether this charter granted to the A. & B. R. R. Co. on February 9, 1857, or rather whether the section of it referred to, allowing subscriptions from county courts of counties along the line

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of the road without a previous vote of the people, is not repealed by the subsequent acts of the Legislature passed in 1860 and 1861, and before the subscription made in this case.

The law in the revised code of 1855 concerning railroad corporations did not require any election. The thirtieth section reads: "It shall be lawful for the county court of any county, and the city council of any city, to subscribe to the capital stock of any railroad company duly organized under this or any other act in this State, and the county court or city council subscribing or proposing to subscribe to such capital stock, may, for information, cause an election to be held to ascertain the sense of the tax-payers of such county or city as to such subscription, and as to whether the same shall be paid by issue of county or city bonds, as the case may be, or by taxation."

The act of January 14, 1860, amendatory of this law, merely changes the words "may for information" into "shall for information."

That of March 23, 1861, which was also an act amendatory of this general statute in the revised code of 1855, requires an election to be held, and positively prohibits a subscription if the result of such an election shows a majority of the votes of the county against it.

It is not of any importance therefore to inquire, whether the act of 1855 would not of itself be regarded as an expression of the intention of the legislature to prohibit the county and city authorities from subscribing to railroad corporations, without ascertaining the wishes of at least a majority of the people within their respective municipalities, because the amendatory act of 1861 undoubtedly so declares; and this act, as well as that of 1860, was passed before the subscription now in question was made.

At the same time the charter of the A. & B. R. R. Co.—and we may add, without going outside of the history of various and repeated State adjudications and State legislation, the charters of a number of other railroad companies—allow-

ed the counties, cities, and towns to subscribe without any vote of the people. The question is, whether these provisions in the general law on the subject of railroad corporations repealed the specific provisions of the special acts chartering particular companies. In 1867 the Macon county case was decided (41 Mo., 453), and the subject was there discussed and decided.

It is true, that the act of 1861, though referred to by counsel, is not particularly noticed in the opinion of the court, but the act of 1865, which passed before the subscription made in that case, is fully considered as well as the prohibitory clause of the constitution of 1865. The act of 1865 was just as stringent as the act of 1861, so far as the necessity of a vote is concerned, and it was more so in regard to the number of voters essential to authorize the subscription. The subscription in that case was made in 1867, after the adoption of the new constitution, and after the passage of the act of the Legislature carrying into effect the constitutional provision.

In this case (the Macon county case) the case of *Alexander vs. City of St. Louis*, 23 Mo., 483, is particularly examined, and the opinion of the court in this last named case is re-affirmed, and the doctrine applied to the case under consideration. It was *held*, that a general prohibition is not inconsistent with a special indulgence, and that a special indulgence is not repealed by a general prohibition, though the latter is subsequent in time to the former. In the case of *Alexander vs. St. Louis*, the city was by its charter expressly prohibited from subscribing to the stock of any corporation, and a special act passed before the passage of the charter, allowing it to take a certain amount of stock in the Ohio and Mississippi Railroad Company, was held to be valid, and not affected by the general provision of the charter. In the Macon county case the same doctrine is asserted and the same subject—though not in regard to railroad incorporations—is discussed in *Deters vs. Renick*, 37 Mo., 597, in *State vs. Probate Court*, 38 Mo., 529, and in the *City of St. Louis vs. Ind. Ins. Co.*, 47 Mo., 146, and a similar conclusion reached.

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Moreover the Macon county case was followed by the Nodaway county case decided in 1871 (47 Mo., 349), and the Sullivan county case, decided by this court at the February term, 1873, (51 Mo., 522,) re-affirming the first decision.

So that the provisions of the Rev. Code of 1855, and the amendatory acts of 1860 and 1861, and the constitutional prohibition, and the legislative adoption of that prohibition immediately after its passage, have been held by repeated adjudications, and without any conflicting opinions of the court or any individual judge thereof, so far as the reports show, not to affect the repeal of the privilege contained in special charters.

That this was understood to be the law of this State appears also to have been recognized by the legislative department of the government, for in 1872 the Legislature passed an act entitled "an act to repeal certain sections of law granting to county courts and other corporate bodies the power to subscribe stock to railroad companies." This act was approved January 30, 1872, and specifically repeals certain designated sections in certain acts particularly specified, and including, among the twenty or thirty charters enumerated, the charter of the A. & B. Co. This was, or would have been, a mere act of supererogation, if it had been understood or supposed, that previous legislation on the subject had already effected this object.

Thus it will be seen that, up to January, 1872, the decisions of the Supreme Court had been acquiesced in, and no doubt acted on, by the railroad corporations and the municipal authorities of various counties, cities and towns, as the judicial history of the State abundantly shows. The necessary result was the investment of vast amounts of money in securities issued by counties, cities and towns, by virtue of the provisions in the charters of railroad companies. After the acts of 1855, 1860, 1861, 1863, the subject was regarded as *res adjudicata*, and upon this view millions of dollars have been invested.

Whatever, therefore, might be the opinion of this court or

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of any individual judge, had the question come up for examination as an open one, we are all of opinion that it is now too late to disturb the received construction.

But it is objected in this case, that the bonds in controversy on their face purported to have been issued under the act of 1855, and that the holder is estopped from claiming that they were issued under the special act of 1857, which was the charter of the company.

Whether the recital in these bonds would constitute an estoppel against the makers, it is not important to inquire; if it were so, it would not follow that the purchaser or holder is bound. If he can show that the power existed, a false recital of it, however obligatory on the county or its agents, would not defeat its efficacy in the hands of a party nowise concerned in the perpetration of the falsehood. *Crane vs. Lessee of Morris*, (6 Pet., 598.)

Conceding, however, that the law is otherwise in regard to this recital, the question would still remain whether a recovery on such bonds could be defeated by proof on the part of the county that no election was held. This question was presented by instructions in the Circuit Court, and decided; and although it might be passed by in this case, yet as it is an important question, and arises in other cases now before the court, it may as well be considered here.

In the examination of this question, it is proper to inquire what determination, if any, has been reached by the Supreme Court of the United States on this point. The decisions of that court are not obligatory on this court in questions of this character, but it is certainly very desirable and of great importance to such of our own citizens as have invested in such securities, that they should not be depreciated below their value in the hands of citizens of other States or foreigners. The Federal courts having long since determined that these securities occupy the footing of commercial paper, do not consider themselves bound by the decisions of the courts of the State where they are issued, and have, in fact, utterly disregarded them in various instances, as the numerous cases in

the Supreme Court from Iowa and some from Michigan show. The only effect therefore of contradictory decisions here, if such should occur, would be to compel our citizens, who hold such bonds, to sell them, perhaps at a ruinous discount, to citizens of other States, who can sue in the Federal courts.

I do not propose reviewing the numerous cases in the Supreme Court of the United States on this subject. They run over a considerable period, commencing perhaps with the case of *Knox County vs. Aspinwall* (21 How., 539,) and terminating, so far as the published decisions go, in the case of *Grand Clute vs. Winegar* (15 Wall., 355.) There may be more recent cases, but I have not access to them.

In this case of *Grand Clute vs. Winegar*, the question came up in a shape which renders the view of that court on it clear and unmistakable. The point is presented by a plea and demurrer, and is therefore not liable to be misunderstood, or to admit of conflicting constructions, as the generalisms or abstract propositions stated in other cases seem to have been considered. The seventh plea was "that no special election, such as the act prescribed, had been called or held, previous to the issue of the bonds." The act under which the bonds were issued, § 6, declared, "no bonds shall be issued by any town in pursuance of this act unless a majority of the votes, cast in said town at the election hereinafter mentioned, shall be in favor of the same." Section 7 says "a special election shall be called and held in each of the towns before named, for the purpose of carrying this act into effect, within six months after the passage of the act," and then proceeds to specify particularly the mode of conducting the election. To this seventh plea, there was a demurrer, and the demurrer was sustained by the Circuit Court before which the case was tried, and on appeal to the Supreme Court the judgment was affirmed.

Mr. Justice Hunt, who delivered the opinion of the court, refers to *Knox County vs. Aspinwall*, (21 How., 539,) *Mercer County vs. Hackett*, (1 Wall. 83,) and *Meyer vs. The City of Muscatine*, (1 Wall., 384,) and, quoting the language of Judge

Nelson in the first named case, says, that a *bona fide* holder for value of a bond, issued under an act of the Legislature, has a right to presume that *all* precedent requirements of the act conferring the power have been complied with. He says emphatically, that "the cases cited are in answer to the numerous offers to show want of compliance with the forms of law, or to show fraud in their own agents."

Now, in this case, "the form of law" not complied with was the total absence of any election at all, which the law required; and this fact was specially pleaded, and to this plea there was a demurrer, which, of course, admitted the fact. There is, therefore, no room for misconception, as there was in some of the other cases which decided the same thing in general terms. The plea was held bad, and the want of an election held to be no defense.

The court, however, go further, (I may say the court for no dissent of any of the judges appears in the report) and quote with approbation the head-note of the reporter in the Aspinwall case, and apply it to the case then under consideration. In the Aspinwall case there had been an election, but upon an insufficient notice; but the court in this Winegar case, where there was no election at all, apply the principle or doctrine as announced by Judge Nelson, and put at the head of the case by the reporter, "that where the bonds on their face import a compliance with the law under which they were issued the purchaser is not bound to look further for evidence of a compliance with the conditions of the grant of power."

Notwithstanding some fluctuations of opinion as to the extent to which the doctrine in the Aspinwall case went, we may assert with confidence, that, with the exception of the case of *Marsh vs. Fulton County*, all the cases since have conformed to the spirit and meaning of the Aspinwall decision. There were at first some dissenting judges who sought to establish different views, but recently it seems to be conceded, that the court has fully and finally settled on the doctrine of this leading case, and sustained the validity of municipal bonds in the hands of *bona fide* holders, wherever an authority to issue

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them is conferred by law, although that authority may have been accompanied with conditions and limitations, which were disregarded by the municipal authorities. At times this presumption of a compliance with the law on the part of the agents designated by the Legislature seems to have been based on estoppels, such as recitals on the face of the bonds, the fact that the county or city had levied taxes to pay interest on them, or had received in exchange for the bonds certificates of stock from the railroad companies. This last was the only estoppel in the case of *Pendleton vs. Amy*, (13 Wall., 297.) But the court ultimately take the broad rule heretofore stated, and which is thus announced in the *City of Lexington vs. Butler* (14 Wall., 283), "that when a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and are no more liable to be impeached in the hands of such a holder than any other commercial paper."

This being the result of the adjudication of the Supreme Court of the United States, let us see how the question stood here at the time the bonds in question were issued and purchased.

In 1863, the case of *Flagg vs. the City of Palmyra* was decided, (33 Mo., 440). In that case the return of the city officers set up as a defense, among other matters, that there was no election, though required by the act of the Legislature authorizing the subscription. Issue was taken on this plea, but the evidence on the trial is not reported or noticed in the opinion of the court, for the manifest reason, as it will appear from the opinion, that the court regarded the issue as immaterial; for the court say: "In this case, if the bonds have been issued by the city of Palmyra in apparent compliance with the law, and themselves gave no evidence of a want of performance of the pre-requisites to their issuance, and no actual notice of any such defect is traced to the bond-holder, we will not hold the bond-holder to be affected by a failure of the officers of the City of Palmyra to perform all that was re-

quired by law of them, in anticipation of and preparation for the issuing of these bonds. Being issued in apparent conformity to the law, the public (any of whom might acquire the bonds) is entitled to view them as issued in actual conformity to the law, and to suppose that all the acts required of the people and officers of the City of Palmyra had been duly performed."

"To apply these principles to the present case we hold the bond-holder to a knowledge of all that is contained in the act of the general assembly to incorporate the City of Palmyra and the amendatory acts above quoted; but in the absence of actual notice, do not hold them bound to inquire *whether an election had been held* as to the making of a subscription of stock in the Q. & P. R. R. Co., or as to the regularity of such an election, or the qualifications of the voters thereat, or whether the City of Palmyra had actually subscribed stock in the Q. & P. R. R. Co., or whether such subscription was made by the proper officer or officers of the city of Palmyra. The issuing of the bonds authorizes the receiver or purchaser thereof to suppose *that all those things*, if required by law, have been done in the time, form and substance required by law."

This language is plain, pointed and unambiguous, and substantially enunciates the doctrine of the Supreme Court of the U. S. in the cases to which we have referred.

This was the law of this State in 1863, and continued to be the law until the case of *Steines vs. Franklin County*, 48 Mo. 167, was decided, which was in 1871, eight years after the decision in *Flagg vs. Palmyra*. The bonds in controversy in the case now under consideration were issued in 1865, the interest coupons were paid in 1866 and partly in 1867, so that the law as declared by this court in the case of *Flagg vs. Palmyra* is the law which ought to govern the rights of the parties. (*Gelpeke vs. City of Dubuque*, 1 Wall., 175; *Thompson vs. Lee County*, 3 Wall., 327; *Havemeyer vs. Iowa County*, 3 Wall., 294.)

I have been unable to see the force of the distinction, which this court has recently made between the various pre-requisites imposed by law upon the action of municipal bodies, and

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the grounds upon which a prominence is given to a mere election without regard to the substantial defects which may accompany it.

It would seem that an election without notice or upon insufficient notice, or one in which the requisite majority is not obtained, or at which disqualified votes are allowed, would be as worthless as no election at all. Of course mere formal defects occupy a different position, and may well be passed over, but it is conceded in all the cases, that every question as to regularity of the election and its result is closed against the municipal body that issues the bonds, and it is only essential to their validity in the hands of a *bona fide* holder that some sort of an election should be held. It may be that only a majority vote for the subscription when the law requires two-thirds; it may be that from the want of sufficient notice a mere fraction of the voters appear at the polls; it may be that hundreds of minors or other disqualified persons have voted; and in all these cases the pre-requisite of an election is as completely and essentially evaded as if no election had been held. Yet the officers of the municipality are allowed to decide upon these questions and their decision is held conclusive. Why not hold it equally conclusive when no election at all is pretended? It is said, that the power to subscribe is derived from the people of the county or city, and if this be conceded, a fraudulent or unfair and illegal election is as fatal to the exercise of the power as a subscription without any election at all.

But the power is derived from the law, without which the unanimous vote of every voter in the county or city could not confer it. The law gives the power, but restricts its exercise by requiring an election. The power is not derived from the people of the city, or the county, or township, but from the legislative branch of the State government. These municipal subdivisions are authorized to issue negotiable securities upon certain conditions, and one of the conditions is not complied with. All the conditions and restrictions and limitations are equally binding. The absence of one of the pre-

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requisites is as fatal as another. The securities are negotiable, and go into the market as mercantile paper. Is the buyer bound to inquire whether the pre-requisites have been complied with? Or is he authorized to assume that these municipalities have done their duty as the bonds on their face certify?

As I understand the doctrine of agency, a negotiable instrument cannot be defeated by a plea that the agent who executed it exceeded his powers; provided he was authorized to execute such an instrument upon conditions which he failed to observe.

If a clerk or cashier signs paper as an agent to an amount exceeding that allowed by his principal, the holder can recover from the principal. *Farmer's Bank vs. Butcher's Bank* 16 N. Y., 125.

If a security on a negotiable instrument makes the principal his agent, and instructs him to deliver it only in case some other person signs it, and the agent delivers it without such additional signature, all the cases hold that the security cannot defend on the ground of want of authority. This is decided in a case at the present term.

The result of the decisions of the United States Supreme Court, and of this court at the time of the issuance of the bonds in controversy, is, that the holder had a right to presume that the act of 1855 and the amendments thereto had been complied with, and therefore the defense of no election was unavailing.)

It will, of course be understood, that throughout this opinion all the questions examined are in regard to the rights of *bona fide* holders of municipal bonds, and are not intended to indicate any opinion upon questions arising on mandamus, or injunction, or other form of proceeding to arrest the action of municipal bodies or their officers. We have not referred to the decisions of this court on such questions, because very different considerations enter into such adjudications. Moreover the law inflicts heavy penalties upon municipal officers, who exceed or disregard their powers in subscribing to railroad companies, not only pecuniary but personal.

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In conclusion, I venture to copy and adopt the opinion of Judge Greer in *Wood vs. Allegheny County* (3 Wall. Jr., 267), whose opinion, however bluntly and, perhaps, quaintly expressed, seems to me quite as applicable to the condition of affairs in Missouri as he supposed it to be in Pennsylvania:

"If the right of a municipal corporation to subscribe, even when authorized by the Legislature, to purposes so alien to its general purpose as the construction of works of improvement, which in their largest part are in distant counties and other States, were open to me for consideration as a new point, I cannot say that I should hold such subscription other than simply void. The strongest arguments at law have been made against such subscriptions, and they are worth recurring to as containing true and lawyer-like views of the extent and character of municipal powers. But the matter is not open in this court. The Legislature of Pennsylvania has authorized counties to make such subscriptions, and the Supreme Court of the State has decided, though by a bare majority, that the act is constitutional.

"In spite then of all resistance by the county to paying these bonds, here are the bonds, upon which the county promises to pay. The county said to the railroad companies: 'We want to help you; we have not the money, but we will lend you our credit, our promise to pay.' That promise is, or ought to be, sacred. Doubtless many improper things have been done. The whole business of making cities and counties to subscribe to railroads was unwise. This will be admitted now; though the counsels of the able and conservative men, who took ground against it, were not heeded when given. Mercantile and popular clamor demanded 'subscription;' traders, politicians and all kinds of interested jobbers urged and drove the matter, while commissioners, grand jurors and legislators have been led in the train. It is to be lamented that such things should be done, but they have been done. If the electors of our cities choose to hand over the great concerns of our public offices to ignorant and unprincipled administrators, they must suffer by it. They must themselves bear the bur-

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dens, which they put it in the power of knaves to pile upon them. Whatsoever a man soweth that he shall reap, and when he sows the wind he is apt to reap the whirlwind.

"The objections urged against the plaintiff's claim would have force, if the question were between the county and the railway companies, but it is not. It is between an innocent holder for value of a bond payable to bearer, and the party who sent it out into the market or handed it over to others to do so, where it has been sold in the course of trade. It is useless to bring forward here, as against the business operations of this day, abstract dogmas out of Blackstone or the Institutes of Coke. Such instruments as these were never dreamed of in their day. The laws of trade suggest and govern these matters. As I said in the beginning, here is the bond; here is the fact. Your promise to pay is put upon the market. You gave it this negotiable and coupon form for the purpose of facilitating sale and preventing all questions of equity about it, and now, when the promise has been put upon the market and sold to an innocent holder, you set up these equities. That won't do. Why did you issue your bonds if you meant that the holder should look to the railways? Why did you not leave the railways to issue their own? For this reason only, that you knew that capitalists would trust *you* and would not trust them. I esteem the bold, hardy and industrious people of this county, I feel for them with this load of debt put upon them by the careless and unworthy persons whom they have elected to office. But they have allowed the bonds to be issued and sold, and they *must* pay for them."

The judgment of the Circuit Court is affirmed, with the concurrence of all the Judges, except Judge Sherwood, who is absent.

ADAMS, Judge, delivered the opinion of the court on the motion for a rehearing.

This motion was not filed within the time prescribed by the rule of this court, requiring such motions to be filed within ten days after the opinion of the court shall have been delivered.

But as it is a very important case, and as there seems to be some misunderstanding in regard to the precise points passed upon by the court, we have considered the motion, and, in overruling it, I deem it proper to state briefly what was concurred in by us.

1. We assented to the proposition that the charter of the Railroad Company, which was enacted in February, 1857, allowed counties to subscribe to the stock of the Company, without taking a vote of the people. In regard to this matter the charter is plain and positive.

2. The next point was, whether this provision of the charter had been repealed by any subsequent legislation, or by the new constitution of 1865. This point we considered settled by repeated decisions of this court, to the effect that no subsequent act of the Legislature or the constitution had repealed that provision in the charter.

On the faith of these decisions large amounts had been invested, and we considered, that the question had been put at rest, and had become a rule of property which we had no right to disturb. This decision only applies to such charters as were granted prior to the constitution of 1865. There is nothing in the opinion which will warrant the conclusion, that we considered that part of the charter, allowing such subscriptions, a franchise which could not be repealed, either before or after the adoption of the new constitution.

3. It was not necessary to decide, that the recitals in the bonds, issued by the County Court to the Railroad Company, were conclusive, or amounted to an estoppel.

In my judgment, and in the judgment of a majority of the court, they do not amount to an estoppel. Although that is the settled doctrine of the Supreme Court of the United States, it has not been sanctioned here so as to make it a rule of decision in this State. These bonds were issued after the opinion of this court in *Flagg vs. City of Palmyra*, and before the *Franklin county* cases.

In delivering opinions, the judge who delivers them is allowed to make his own arguments and illustrations, without

compromising the other judges. It is unnecessary to say, that the illustrations indulged in by the learned judge, who delivered the opinion under review, were his own, and it was not necessary for the other judges to sanction them in order to concur in the result.

The only new point in this motion, not passed on by the court, is, that the charter of the company had ceased before the company was organized. Whether the corporation had a legal existence or not when the subscription was made, is a question that cannot be raised in a collateral proceeding.

It did exist as a matter of fact, and was in the exercise of all its chartered franchises, when the subscription was made and the bonds issued.

The only proper way to test this matter, is by a direct proceeding by the sovereign power of the State. It is a question between the State and the company, and a proceeding by way of *quo warranto* is the proper remedy. (State Bank vs. Merchants' Bank of Baltimore, 10 Mo., 124.)

The motion for a rehearing is overruled. Judge Napton filing a separate opinion. The other Judges concur.

Separate opinion by Judge NARROW on the motion for a rehearing.

In the opinion overruling the motion for a rehearing, I concur.

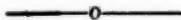
In the opinion of the court heretofore filed, I discussed no question which was not raised by the record.

The points were two: First—Whether the laws passed since 1857—the date of the charter in question—repealed the privilege granted in that charter of taking subscriptions from counties without a vote; and upon this point the court was agreed, that they did not, on the authority of various decisions referred to. The next point was, whether, if the bonds were conceded to have been issued under the law of 1855, as on their face they purported to have been, the absence of an election defeated a recovery on them; and upon this point, I referred to the decisions of the Supreme Court of the United States, and to the decisions of this court anterior to, and long

after, the issue of the bonds in controversy, and showed, that both courts held such bonds valid in despite of the want of an election, and as such was recognized to be the law, both in this State, and by the Supreme Court of the United States, at the time of their issuance and purchase by the holders, the bonds could not be defeated by such a plea, although this court might have held differently since, and might entertain a different opinion now.

Upon both these points, I adhere to the opinion heretofore given.

There was, of course, no opinion given in regard to bonds issued under charters general or special, granted since the new constitution, for no such question arose, nor could any such question arise in regard to special charters, as the new constitution prohibited any such charters.



LEAKEN D. BAKER, Respondent, *vs.* PRESS. G. KENNETT, Appellant.

1. *Infants—Conveyances to, etc.*—Conveyances to infants are not void, but merely voidable.
2. *Infant—Conveyance to—Acts of disaffirmance, what sufficient.*—An infant who had taken a deed of land, and given his note for the purchase money, made an attempt to disaffirm the contract before his majority, and again within a few days thereafter, and, upon the refusal of the vendor to agree thereto, offered to give him \$2,000 together with the improvements erected by himself on the land, by way of compromise; and abandoned the premises and left them in a position for the vendor to occupy at any time he saw fit.
Held, that the disaffirmance was sufficiently speedy and unequivocal to avoid the contract.
3. *Infants—Contracts by—Ratification of, after majority—What sufficient and what not.*—To constitute a ratification of an infant's contract, a mere acknowledgment that the debt existed, or that the contract was made, is not sufficient. There need not be a precise and formal promise, but there must be a direct and express confirmation and a substantial promise to pay the debt or fulfill the contract. And the promise must be made with a knowledge of the facts, and with a deliberate purpose of assuming a liability from which the party knows that he is discharged.
4. *Infant—Note by—Disaffirmance of—Sureties, etc.*—Where an infant gives his note for land purchased, and at his majority disaffirms the contract, the sureties on his note will not be liable.

Appeal from Jefferson Circuit Court.

John L. Thomas and Bro., for Appellant.

I. A rash, improvident and hard bargain made by an infant with an adult, who has knowledge of his infancy, without an adequate consideration, is clearly and utterly void and will be so declared by a court of equity. (1 Sto. Eq., §§ 235, 236, 240, 242; Sto. on Cont., § 57; 25 Iowa, 95; 2 Atkins, 34.)

Those contracts of infants are void which the courts can declare to be to their prejudice. This prejudice to the infant may appear either from the papers or from the transaction, viewed in the light of surrounding circumstances. (Tyler Inf., 43, and cases cited; Chamb. Inf., 446; 1 Mass., 82; 2 H. Black, 515.) And such a bargain cannot be ratified by the infant on his attaining majority. (1 Sto. Eq., § 241; Chamb Inf., 450; Tyler Inf., 42; 25 Iowa, 95; Shackelford vs. Smith 5 Dana, 232.)

The contract in this case was by the infant disaffirmed before his attaining his majority, and stood as if no such contract ever existed. Hence it could not be affirmed afterwards. (Derocher vs. Con. Mills, 58 Me., 217; Vent vs. Osgood, 19 Pick., 572; Robinson vs. Weeks, 56 Me., 102.)

Before the ratification of a contract made by an infant can bind him, it must be re-affirmed by him, after his attaining his majority, with a full knowledge that he is not bound without a new promise.

Thos. C. Fletcher, and Reynolds & Relfe, for Appellant.

I. The offer by the infant, before attaining his majority, to re-convey the premises for the purchase money, for which the note in suit was given, the renewal of that offer, accompanied by his abandonment of the premises a few days after attaining his majority, and the tender of a *bonus* of two thousand dollars to be let off from his bargain, are conclusive proofs of disaffirmance on his part, and worked a complete discharge at least as to time. His acts after coming of full age are only explicable upon the supposition that he intended to abandon his contract. (Sto. Cont., § 72; Tyler Inf., §§ 31, 41, Bingham Inf. & Cov., § 65, note 1, and § 132; Chamb. Inf., § 435.)

II. Being discharged from the debt by the abandonment of the contract, no subsequent acknowledgment of that debt, however explicit, would give any right of action against him. (*Dupuy vs. Swart*, 3 Wend., 135; *Bell vs. Morrison*, 1 Pet., 371; *Edgerton vs. Wolf*, 6 Gray, 453; *Heath vs. West*, 28 N. H., 101; *Vent vs. Osgood*, 19 Pick., 572; *Robinson vs. Weeks*, 56 Me., 102; *Derocher vs. Continental Mills*, 58 Me., 217.)

III. The letters written by Cline, Jamison & Day, to Press. Kennett, were written with the intention of entrapping him into a recognition of the debt; and his answers to them were written under a mistake as to the ownership of the note, and as to the fact, that, without a new promise from him, he and his sureties were discharged. If one freely and deliberately, and upon full information, confirms the precedent contract, courts of equity will generally hold him bound thereby; but if he is still acting under the pressure of the original transaction; or if he is still under the influence of the delusive opinion that it is valid and binding upon him, then, and under such circumstances, courts of equity will hold him not barred from relief, by any such confirmation. The promise must be made voluntarily, freely, and with full knowledge that otherwise he would not be liable; that, without it, he was by law discharged. (*Bing. Inf.*, § 69; *Tyler Inf.*, § 80; *Chamb. Inf.*, § 437; *Sto. Eq.*, § 345; *Parsons Cont.*, § 324; *Chesterfield vs. Janssen*, 2 Ves. Sr., 125; *Crowe vs. Ballard*, 2 Cox Ch. C., 253; *Ford vs. Phillips*, 1 Pick., 202; *Harmer vs. Killing*, 5 Esp., 102; *Smith vs. Mayo*, 9 Mass., 64; *Curtin vs. Patton*, 11 S. & R., 305; *Hinely vs. Margaritz*, 3 Pa. St., 428; *Shackelford vs. Smith*, 5 Dana, 232.) The only authority against this position that we are aware of, is that of *Morse vs. Wheeler*, 4 Allen, 570, cited by the Judge, who delivered the opinion in that case, in his own treatise on Contracts (see *Metc. Cont.*, 59); so that we respectfully suggest, that the learned jurist and writer stands alone against the formidable array we have cited above. Hence we contend, that even if our secured proposition is not well taken, viz: that having

been discharged from the debt, no subsequent acknowledgment would revive it, yet it is clear that the promise contained in the letters to the attorneys for plaintiff does not bind the infant, as it was obtained by fraud and misrepresentation, and made in ignorance of the fact, that, without it, he was discharged.

IV. The legal proposition contained in Schouler Dom. Rel. 535, so strongly relied on by the plaintiff in the lower court, "that infancy does not protect the indorsers or sureties of an infant, or those who have jointly entered into his voidable undertakings; that they, if of full age, may be made liable though the infant himself escapes responsibility," does not apply to this case. An examination of every case cited by Schouler will show, that they are cases where the sureties claimed a discharge by the mere fact of the infancy of the principal. In the case at bar, the sureties claim a discharge on the ground that the infant having disaffirmed the contract, there was a total failure of the entire consideration, and that on that ground they are released. Here is a case of subsequent failure of the consideration, which is equally fatal with an original want of consideration. (Bing. Inf., § 9, note d; Sto. Bills, § 184 *et seq.*, and cases cited.)

Cline, Jamison & Day, with Abner Green, for Respondent.

I. Infancy does not protect the indorsers or sureties of an infant or those who have jointly entered into his voidable undertakings. They, if of full age, may be made liable though the infant escapes responsibility. (Schouler Dom. Rel., 535; Parker vs. Baker, Clarke Ch., [N. Y.,] 136; Hartness vs. Thompson, 5 Johns, 160; Frazier vs. Massey, 14 Ind., 382.)

II. The letter written to the attorneys of the plaintiff by Kennett after he became of age was as follows:

"February 1, 1873.

Cline, Jamison & Day, Attorneys at Law.

"*Gentlemen*—I received yours of previous date only day before yesterday, in which you want me to pay two thousand dollars on note held by you against me. Now, gentlemen,

Baker v. Kennett.

there is no one more anxious to pay a note than myself ; but my total inability to do so at present is apparent to me, whether it may be to Mr. L. D. Baker or not. I have property which I am trying to sell, and as soon as I can I intend to settle my notes. If I can find a purchaser for the farm (which I gave Mr. Baker my note for) I can then pay him amount of note. Until then I have no money. I have property, but no money at present. If I ever sell my mining lands I will pay L. D. Baker, but can't possibly do so at this time.

Very Resp't.,

PRESS. G. KENNETT."

Kennett testified at the trial, that he had sold his mining lands ; and the language of the letter shows, that he still held the farm as his own, and that he knew that plaintiff was still the owner of the note. And these facts make a complete ratification of the contract. (Bing. Inf. 69 and n. ; Highley vs. Barron, 49 Mo., 103 ; Boyden vs. Boyden, 9 Metc., 519 ; Lawson vs. Lovejoy, 8 Maine, 405 ; Robbins vs. Eaton, 10 N. H., 562 ; Holmes vs. Blogg, 8 Taunt., 39 ; Hubbard vs. Cummings, 1 Maine, 11 ; Whitney vs. Dutch, 14 Mass., 460 ; Ferguson vs. Bell's Admr., 17 Mo., 347 ; Harris vs. Wall, 1 Exch., 128 ; Martin vs. Mayo, 10 Mass., 137 ; Bobo vs. Hantsell, 2 Bailey, 114.)

III. A ratification by a person of his contract made during infancy is good, even though he is ignorant of the fact that he is not legally liable. (Metc. Cont. 59 ; Morse vs. Wheeler, 4 Allen, [Mass.,] 570.) And though Parsons on Contracts [vol. 1, page 323,] speaks of a contrary doctrine, it will be seen that he does not refer to the case of Morse vs. Wheeler, but cites two cases in that State, both of which had been expressly overruled by the case of Morse vs. Wheeler.

WAGNER, Judge, delivered the opinion of the court.

(This was an action on a promissory note executed by the defendant on the 1st day of May, 1872, in favor of the plaintiff for the sum of eight thousand dollars.

The record discloses these facts : That at the time the note was made and executed, the plaintiff was the owner of a tract

of land in Jefferson county, and that the defendant, Press. G. Kennett, then a minor under the age of twenty-one, was desirous of purchasing the same. The parties finally came to an agreement, and the price was fixed at eight thousand dollars; plaintiff making to the defendant, Kennett, a deed for premises, and he executing the note sued on, due and payable seven months after date, with ten per cent. interest from the date thereof, with his mother and sister signing the note as his sureties. The evidence clearly shows, that the land was not worth the sum agreed to be paid for it. Kennett took possession of the same, making considerable improvements thereon, and on the 15th day of Sept. 1872, whilst he was still an infant, he went to the plaintiff and demanded back his note, offering to re-convey the land, and pay the interest due on the note. Shortly after his majority, he offered to pay two thousand dollars, and re-convey the property to plaintiff, and give him the improvements that he had put upon the premises, but this offer was refused. When Kennett made this last offer, plaintiff told him that Mr. Jamison had the note, and proposed that he should go to Jamison and pay the \$2,600, and have it credited upon the note, but this proposition Kennett declined. Mr. Jamison is a lawyer, and a member of the firm of Cline, Jamison & Day, and there is a conflict of the testimony here between the plaintiff and defendant.)

Kennett says, that at that time plaintiff told him that he had sold the note to Jamison, and that he was ignorant that Jamison was a lawyer, whilst the plaintiff swears that he told him that Jamison was his lawyer, and that he had placed the note in his hands for collection.

On Nov. 10th, 1872, Kennett attained his majority, and he abandoned the premises leaving a man there to take care of them, saying that there would be a lawsuit about them, and that the tenant should keep them for whoever became ultimately entitled to them.

Suit was brought on the note, March 11, 1873, and two letters were introduced on the trial, written by the defendant, Kennett, to Cline, Jamison & Day, dated respectively in Dec.

1872, and Feby. 1873, in which he recognizes the debt, and makes propositions in reference to its payment.

These letters, however, he alleges, were written whilst he was under the impression that the note had passed into the hands of an innocent purchaser before maturity, and after he had taken the advice of counsel who informed him that he could make no defense to the note.

At the trial a deed was exhibited and tendered to the plaintiff reconveying the premises to him, but its acceptance was refused.

After hearing the evidence, the court below gave judgment for the plaintiff, and the defendant has prosecuted an appeal to this court.

The old distinction between the void and voidable contracts of infants is becoming exploded by the courts, and the tendency of the modern decisions is in favor of the reasonableness and policy of a very liberal extension of the rule, that the acts and contracts of infants should be deemed voidable only, and subject to their election when they become of age, either to affirm or disavow them. (Townsend Adm'r. vs. Cox, 45 Mo., 401; 2 Kent's Com. [10th Ed.], 268, and cases cited.)

If an infant would disaffirm his contract, and recover back his property, either real or personal, he must refund what he has received. There can be no right of recovery as long as any part of the consideration is withheld. (Kerr vs. Bell, 44 Mo., 120; Highley vs. Barron, 49 Mo., 103.)

In cases of sales of land the general doctrine seems now to be, that the infant cannot conclusively avoid the conveyance till he arrives at age. (Schneider vs. Staihr, 20 Mo., 269; 1 Am. Lead. Cas. [5th Ed.], 317; Stafford vs. Roof, 9 Cow., 626; Bool vs. Mix, 17 Wend., 120.)

Leases and conveyances to infants form no exception to the prevailing rule—they are not void, but only voidable. (Griffith vs. Schwenderman, 27 Mo., 412; Irvine vs. Irvine, 9 Wall., 617.)

In the case of Irvine vs. Irvine, *supra*, the court lays down the rule, that it is not necessary to the affirmation of an in-

fant's voidable deed, that there be an affirmance by him after he comes of age, as solemn in character as the original act itself, still mere acquiescence without anything else is not generally sufficient evidence of affirmance. But any ratification or affirmance of a clear and unequivocal character, showing an intention to affirm deed, is, however, enough.

Something must be done by which it is plainly manifested, that the infant intends to confirm or ratify, as in the case of *Ferguson vs. Bell* (17 Mo., 347), where the infant executed a deed, and after coming of age expressed satisfaction with her bargain, received part of the purchase money, and spoke of her intention to make a confirmatory deed, but died suddenly without having done so. This was held a sufficient ratification.

In *Clamorgan vs. Lane* (9 Mo., 446), Louis Clamorgan, whilst an infant, had sold and deeded certain property to Dr. Lane. At the time when he arrived of age he went to the office of the attorney of Dr. Lane, who had sent for him with a view to procure a confirmation of his previous deed by the execution of another which had been prepared for that purpose. When asked to execute this deed of confirmation, Louis said he was perfectly willing; that the land was Dr. Lane's, and that he would execute a deed as soon as he was of age, but finally declined executing the deed which had been prepared, because of certain covenants contained therein, and the whole matter was deferred till a subsequent day by which time it was supposed an interview would be had with Dr. Lane, and another deed prepared conformably to Louis' views. Upon these facts the court decided, that the mere declarations, or promise, of Louis upon a contingency to make a deed of affirmance did not amount to affirming the deed.

In the opinion it is said: "So far from confirming the deed of August, it would seem that he expressly declined doing so at the time, and though he used some general expressions, that the land was Dr. Lane's, yet such expressions, taken in connection with his acts, cannot amount to a present

confirmation, but only indicate a disposition to confirm at some future time and on stipulated conditions. From the statements and acts of Dr. Lane's agent, Louis must have inferred, that a deed was necessary to a confirmation, and the execution of a deed he deliberately postponed."

Where the infant makes a conveyance of real estate, his mere failure for years to disaffirm affords no proof of a ratification. There must be some clear or positive act performed for that purpose.

The reason is plain enough. By his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. (But where he has purchased or taken a lease to real estate, the case is different. There, if he wishes to rescind or disaffirm, he must do so in a reasonable time.)

In speaking on this subject, the Supreme Court of Maine, in *Boody vs. McKenney* (23 Me., 517), says: "When during infancy he has purchased real estate, or taken a lease of it subject to the payment of rent, or has granted a lease of it upon payment of a rent, in such cases it is obvious, when he becomes of age, that he is under a necessity, or that common justice imposes it upon him as a duty, to make his election within a reasonable time. He cannot enjoy the estate after he becomes of age for years, and then disaffirm the purchase and refuse to pay for it, or claim the consideration paid, or thus enjoy the leased estate, and then avoid the payment of the stipulated rent, or receive rent on the lease granted and then disaffirm the lease. (When he will receive a benefit by silent acquiescence, he must make his election within a reasonable time after he arrives at full age, or the benefits so received will be satisfactory proof of a ratification.)" (*Ketsey's Case* Cro. Jac., 320; *Evelyn vs. Chichester*, 3 Burr, 1765; *Hubbard vs. Cummings*, 1 Maine, 11; *Dana vs. Coombs*, 6 Maine, 89; *Barnaby vs. Barnaby*, 1 Pick., 221; *Kline vs. Beebe*, 6 Conn., 494.)

So in *Robbins vs. Eaton* (10 N. H., 561), it was held, that where an infant purchased land, and continued in possession

occupying and improving the same for some years after arriving of age, and had offered to sell the land, it amounted to a ratification of the original purchase.

And in *Bigelow vs. Kinney* (3 Vt., 353), where an infant, a short time before he became of age, purchased land, and executed his notes and a mortgage to secure the purchase money, and, two days afterwards, in consideration of the notes being given up to him, executed a quit-claim deed of the premises to the person of whom he had purchased, who went immediately in possession, and he and his grantees remained in possession several years before the infant intimated any intention to disaffirm the contract, it was held in an action of ejectment, brought by the infant after having arrived at full age against the person in possession, that he could not affirm the deed which conveyed the land to him and avoid the mortgage executed by him to secure the consideration money; and that, as the quit-claim deed was voidable only by the infant on his coming of age, he ought, if he meant to avoid it, to have given notice of disaffirmance, or otherwise have rejected the contract within a reasonable time after he became of age, and not having done so, he was presumed to have affirmed the quit-claim deed, and, therefore, was not entitled to recover.

Tested by these principles there can be no objection as to the reasonableness of the time in which the defendant disaffirmed the contract. He attempted to do so before he was of age, but in a few days thereafter he tried to rescind the contract, and, upon the refusal of the plaintiff, offered to give him two thousand dollars by way of compromise and also to include the improvements. But further, he did not remain on the place using it for his own purposes and benefit, but abandoned it and left it in a position for the plaintiff to occupy at any time he saw fit or proper to do so.

The disaffirmance was speedily made, and in the most positive and unequivocal manner. It is impossible then to hold the defendant bound by the contract, unless the letters written in December and February be construed to amount to a rati-

fication. The letters acknowledged the liability, and proposed paying the note in installments. The proposition was not accepted.

It is doubtful, according to the rule laid down in *Clamorgan vs. Lane*, whether the letters really did affirm and ratify the transaction. Whilst the defendant spoke of the note as an existing obligation, he appeared to be willing to pay under certain circumstances, but whether that was equivalent to a present confirmation may at least be considered questionable.

The rule, however, is well settled, that to constitute a ratification of an infant's contract, a mere acknowledgment that the debt existed, or that the contract was made, is not sufficient. There need not be a precise and formal promise; but there must be a direct and express confirmation, and a substantial promise to pay the debt or fulfill the contract. The promise must be made with a knowledge of the facts, with a deliberate purpose of assuming a liability from which he knows he is discharged by law. (1 Pars. Cont., 323; *Highley vs. Barron*, 49 Mo., 103.)

In the present case, the defendant swears, and there is nothing to contradict his testimony, that he wrote the letters from which the promise is sought to be deduced under a mistake of facts—under a misapprehension of his liability; that he supposed and believed that the note had been negotiated before maturity, and that he was advised that he could make no defense to it. If this was so, then most assuredly the promise contained in the letters constituted no affirmance or ratification.

He did not act with a deliberate knowledge of the facts. He was wrongly led to suppose that he was liable when in truth he was discharged. But it is contended, that although the infant may not be bound, the sureties are nevertheless liable.

As a general proposition it is undoubtedly correct, that infancy does not protect the indorsers or sureties of an infant, or those who have jointly entered into his voidable under-

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takings. But the cases in which this principle has been decided are clearly distinguishable from the present one. Here, the undertaking of the sureties goes to the whole consideration.

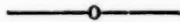
Story says, "that a subsequent failure of consideration is equally fatal with an original want of consideration, and if a bill is given as an indemnity, it is a sufficient answer to it that the party has not been demnified at all, or that the original claim has been extinguished." (Story Bills, § 184.)

By the disaffirmance of the contract the plaintiff gets back his land, and the consideration which upheld the contract is extinguished.

It would be a strange doctrine which would give him back his land, and allow him to recover from the sureties the purchase money also.

The rule quoted does not apply to this case. The plaintiff contracted with an infant, knowing him to be an infant at the time, and after a rescission of the contract he obtains back again what he sold. This the law gives him, but it does not give him the property and the consideration both.

My opinion is that the judgment should be reversed. The other Judges concur, except Judge Napton, who did not sit.



WILLIAM DUVALL by next friend ALLEN JONES, Plaintiff in Error, vs. JAMES D. TINSLEY, Defendant in Error.

1. *Practice, civil—Petition—Specific performance—Rents and profits.*—A claim for specific performance and for rents and profits may be united in the same bill.

Error to Pemiscott Circuit Court.

Louis Houck, for Plaintiff in Error.

I. "A bill is not treated as multifarious because it joins two good causes of action, growing out of the same transaction." (Story Eq. Pl., § 284.)

II. Equity will do complete justice between the parties. (McDaniels vs. Lee, 37 Mo., 204; Holland vs. Anderson, 38 Mo., 55; Watts vs. Waddle, 6 Pet., 389; Stevens vs. Gladding, 17 How., 459; 3 Dan. Chy. Pr., §§ 1906, 1914; Villa vs. Rodriques, 12 Wall., 323.)

R. H. Hatcher & A. J. P. Garesche, for Defendant in Error.

I. The petition is in equity, and the prayer for relief is blended with a prayer for judgment for damages. Equity and law may be united in same petition, but must be stated in different causes of action. (Wynn vs. Cory, 43 Mo., 301; Henderson vs. Dickey, 50 Mo., 161.)

ADAMS, Judge, delivered the opinion of the court.

This case comes here on a demurrer to the plaintiff's petition, which was sustained by the court and final judgment rendered in favor of the defendant.

The petition is in the nature of a bill in equity for the specific performance of a contract for the conveyance of certain lands and town lots in Pemiscott county. The petition alleges, that Lee M. Duvall departed this life sometime in 1865, leaving the plaintiff as his only heir at law; that prior to his death, in February, 1865, he bought of the defendant the lands and town lots referred to, and paid him the contract price, three thousand dollars in hand, and the defendant gave him a title bond, which is exhibited with the petition, whereby he bound himself to make him a deed as soon as it could be done; and that the said Lee M. Duvall entered into the possession, and after his death the defendant entered upon the lands and lots and has retained the possession ever since; that the defendant has neglected and refused to make a conveyance and still neglects and refuses to do so.

The relief prayed for is, that the defendant be compelled to make the plaintiff a conveyance in fee, or that the court decree the title to him; and that the defendant be compelled to account for the rents and profits from the time he entered into the possession.

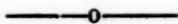
The only ground of demurrer is, that several causes of action have been improperly united in the petition.

The point made is, that the petition claims specific performance, and also the rents and profits, and that it is therefore multifarious. It is a principle of equity jurisprudence too well settled to need illustration or citation of authorities, that a party entitled to a conveyance of the legal title to lands, and also to the possession and rents and profits, may by one suit and one petition or bill, obtain the whole relief. When a court of equity entertains jurisdiction at all, it will give adequate and full relief.

The petition under review is not multifarious. There is but a single cause of action set forth, and that is for the conveyance of the land and the possession of it according to the contract of the defendant; the rents and profits are merely incidental and grow out of the right to the conveyance and possession.

The court could not give full and adequate relief without compelling the defendant not only to make the conveyance, but to surrender the possession and account for the rents and profits.

Let the judgment be reversed and the cause remanded; the other judges concur.



CHARLES BENT CARR, Appellant, *vs.* WILLIAM DINGS, Respondent.

1. *Limitations, statute of—Life estate of widow—Statute commences running, when.*—The life estate of a widow in the lands of her deceased husband, prevents the running of the statute of limitations against his heirs, until after the time of the widow's death.
2. *Limitations—Presumption as to payment of debts.*—The common law presumption of the payment of a debt after the lapse of twenty years still exists, notwithstanding our statute of limitations.

Appeal from Jefferson Circuit Court.

John L. Thomas & Brother, for Appellant.

I. The statute of limitations did not begin to run against the children of George Washington Kerr, until Mrs. Susan Kerr's death, which took place in 1865, and hence, the plaintiff's claim was not barred. The plaintiff's cause of action did not arise till Mrs. Kerr died. (*Park vs. Cheek*, 4 Cold., 20; *Smith vs. Thompson*, 2 Swan, 381; *Ang. on Lim.*, §§ 470-475.)

II. The law raises a presumption after the lapse of twenty years, that the debts have been paid, and if they have not been paid and can still be indorsed the defendant was bound to show it.

Sam. Reber, for Respondent.

I. The will vested the legal title in Allen subject to be divested on and after payment of the testator's debts. But the title never can pass until this condition has happened, and that it has happened, is to be made out by evidence.

II. If Susan Kerr had filed a bill against Beverly Allen to compel a conveyance, she would have had to allege and (if he did not admit it) to prove that the debts were paid and the other residuary legatees, to-wit: the children of G. W. Kerr would have had to do the same thing. But plaintiff has introduced no evidence showing payment of the debts of the estate. He did not even show that it had ever been administered, or that the executor qualified. He is therefore without proof on a material point or compelled to rely on presumptions. But presumptions of a conveyance by a trustee are only indulged where the time at which he was required to make it, has passed—or where there is sufficient reason shown to support the presumption. (*Perry Trusts*, §§ 349, 354, *et seq.*, and where the doctrine on the subject is fully stated.) But according to the terms of the will in this case, the trust might still continue to be a subsisting active or accomplished trust.

III. If the beneficiary claims that the trust has in point of fact been accomplished, he must establish the fact by affirmative evidence. If he does not choose to go into court (where the facts can most conveniently be established) to get a decree of title against Allen's heirs, he must at least show by the record

in the Probate Court, the settlement of Allen's estate, or other competent evidence, that the event has happened on the happening of which the estate of the trustee was to cease

VORIES, Judge, delivered the opinion of the court.

This was an action of ejectment brought to recover a tract of land in Jefferson County.

The defendant by his answer denies the plaintiff's title to the land or his right to the possession thereof. And for further answer avers that he and those under whom he claims said land, have been in the open and notorious possession of the same and every part thereof, claiming the same as their own absolute property under claim of title thereto, denying the title of all other persons, for more than ten years next before the action was commenced; and that neither the plaintiff nor his ancestors, predecessors or grantors or other persons under whom plaintiff claims said land, have been seized or possessed of said lands or any part thereof, or interest therein, for more than ten years next before the commencement of this action. Wherefore, &c.

To the plea of the statute of limitations the plaintiff replied, denying that his right of action was barred by the statute, and averred that one John Kerr was seized in fee simple of the premises in question in the year 1843, and that in the month of December of that year said Kerr executed, in proper form, his last will, by which he bequeathed to his wife, Susan Kerr, the said premises, for and during her natural life, with remainder to the children of George Washington Kerr; that after executing said will, said Kerr departed this life in 1843 leaving the same as his last will; that said will was after his death duly probated and recorded by the Probate Court of St. Louis County where he died; that in May, 1852, the said Susan was married to John A. Craig; that in the year 1864 said Craig died, and that in the year 1865 the said Susan also died; that the adverse possession of defendant and those under whom he claims, if any such possession ever existed, did not commence till about the year 1862, and could

not commence or run against Susan until she became discoverd in the year 1864.

The plaintiff further replied, that he claimed title by deed from Mrs. Clendennin and George W. Kerr, the only children of George Washington Kerr, and avers that the right of him and those under whom he claims to institute a suit for the recovery of said premises, did not arise till the death of said Susan Craig in the year 1865.

The cause was tried by the court, a jury having been waived by the parties.

The plaintiff introduced in evidence; First—The exemplification of a patent from the United States, for the land in controversy, to John Kerr, dated July 15, 1825. Second—The last will of John Kerr, the substantial portion of which is as follows:

“First, I revoke all former wills by me at any time heretofore made. Second, I hereby constitute and appoint Beverly Allen, of the city of St. Louis, aforesaid executor of this my last will and testament.

“Third, I devise and bequeath to my said executor all my estate, real, personal and mixed, and whether held by me as joint tenant, tenant in common or in severalty, in trust for the payment of my debts, which he will pay and discharge in the order prescribed by law for the payment of debts of deceased persons, hereby giving to my said executor power to lease or sell the same, without intervention of courts, as to him shall seem best for my estate and creditors; also in trust, after the payment of my debts, to convey whatever may remain of my estate to my wife, Susan Kerr, to be used and appropriated by her, in and about her maintenance and support, with power to my said wife to dispose of one-fourth of the same, remaining at time of her death, as to her shall seem fit, and the residue of what may so remain shall, at the time of her death, pass to and be vested in the children of my deceased brother, George Washington Kerr. In testimony, etc.”

This will was shown to have been duly proved up in the Probate Court of St. Louis County.

Third.—Plaintiff offered evidence tending to prove, that John Kerr died in 1843, that his wife, Susan, died in March, 1865 or 1866, and that the only children of George Washington Kerr were George W. Kerr and Isabella Kerr, who afterwards married with William A. Clendennin, and that the said George Washington Kerr died between the years 1836 and 1840. It was also shown by the evidence that after the death of John Kerr, his widow, Susan Kerr, was married to Gen. Dunlap, of Louisiana, in 1847; that Dunlap died in the year 1849, that she afterwards, in the year 1852, was married to John A. Craig who died in 1864, and that said Susan died in February, 1865.

Fourth.—The plaintiff then read in evidence a deed from George W. Kerr and Mrs. Isabella Clendennin and her husband, conveying the land in controversy to the plaintiff. This deed bears date the 12th day of July, 1871.

The foregoing was all of the evidence given on the trial of the cause.

It was then admitted by the parties that the defendant had acquired the title to the land in controversy by the statute of limitations and adverse possession, unless the life estate which Mrs. John Kerr acquired in said land under her husband's will, read in evidence, prevented the statute from running against the children of George Washington Kerr, under whom plaintiff claims, until 1865, when she died.

After the evidence was closed, the court at the request of the defendant, declared the law to be that "on the pleadings and evidence the plaintiff is not entitled to recover in this action." To this declaration of law the plaintiff at the time excepted.

The plaintiff then took a non-suit, with leave to move to set the same aside, and in due time filed his motion to set aside said non-suit, because the court had improperly declared the law, and refused proper declarations of law asked for by the plaintiff.

This motion being overruled by the court and judgment rendered against the plaintiff, he again excepted and has appealed to this court.

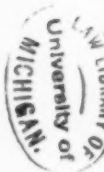
The only questions for the consideration of this court grow out of the declaration of law given by the court.

The declaration of law asked for by the defendant and made by the court is in the nature of a demurrer to the evidence given on the trial, and it follows that if the evidence given by the plaintiff was sufficient *prima facie* to show a title to the land in controversy in the plaintiff, the declaration of law given by the court was improper, otherwise it was correct.

It is contended by the defendant, that by the will of John Kerr, the title to the land in controversy was vested in Beverly Allen, his executor in trust to hold, first, for the payment of the debts of the deceased, and then in trust to convey the remainder of the property, after the debts were paid, to the widow of the deceased for her life and that after her death the legal estate still remains in the trustee, unless it is affirmatively shown by the plaintiff that the debts have all been paid. It is true that the will vests the property of the testator in Allen the executor, in trust, to enable him to pay the debts of the testator, but when the debts are paid by the provisions of the will, this trust is at an end; and the executor is directed to convey the property of testator, of every description, to the widow for her life, and she is authorized to use and dispose of the property for her support during her life, and at her death she may dispose of one-fourth of the property conveyed to her, and the balance the will provides, "shall pass to and be vested in the children of my deceased brother George Washington Kerr."

There is no question in my mind but that upon the happening of the two events named in the will (the payment of the debts and the death of the widow), the property remaining by force of the bequest in the will, would vest in the children of George Washington Kerr. (Mitchell vs. Mitchell, 35 Miss., 108; Harris vs. Lincoln, 2 P. W., 135; Roberts vs. Moseley, 51 Mo., 282.)

There is no question in this case about the death of the widow, that is clearly proved and uncontradicted; but it is contended that there is no proof that the debts of the testator



have been paid, that for aught that appears there may be debts still existing, and that the executor or his heirs may have portions of the testator's property leased for the purpose of raising money to pay the debts, and may still be executing the trust, and that until it is shown that the object of the trust has been fully accomplished, and the trust at an end, the legal estate cannot vest in those who are to hold the remainder.

This is true; but it must be recollected, that John Kerr died in 1843, nearly thirty years before the commencement of this suit, and that the trustee has long since been dead. The common law presumption of the payment of a debt after the lapse of twenty years still exists, notwithstanding our statute of limitations. Almost thirty years having elapsed since the death of John Kerr, all debts against him at his death are presumed to have been paid, and if this presumption is not true in fact, it devolved on the defendant to rebut the presumption by evidence on his part. (Smith vs. Benton, 15 Mo., 371; Clemens vs. Wilkinson, 10 Mo. 97.)

In the case of Smith vs. Benton, the learned judge delivering the opinion of the court says:

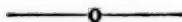
"The law as declared by the Circuit Court is, that after the lapse of twenty years, a bond is presumed to be paid, and that this presumption like any *prima facie* evidence of a fact stands good, unless it be rebutted by evidence to be given by the party setting up the bond, satisfying the jury that in fact the payment was not made."

There is no presumption to be made that the testator owed debts that were not due, or at least there could not be any, that he owed debts which would not be due in six or eight years.

In this case the testator has been dead nearly thirty years, and if he owed debts they are presumed by law to have been paid. The plaintiff could therefore rely on this presumption, and the death of the widow having been proved, the property would vest in the legatees of the remainder, and the plaintiff having acquired his right in the absence of opposing evidence, had a right to recover.

The only remaining question is as to the defense of the statute of limitations. It is well settled that the right of action of one who claims an estate, which can only take effect after the termination of a life estate, does not accrue until the termination of the life estate, and in this case the widow did not die until the year 1865, less than ten years before the action was commenced; but the defendant does not rely on the statute of limitations in this court, and so it is not necessary to refer to authorities on this subject.

The other judges concurring, the judgment is reversed and the cause remanded.



RICHARD M. BRASHEARS, Defendant in Error, *vs.* PALLIS C. HICKLIN, *et al.*, Plaintiffs in Error.

1. *Administrator—Final settlement, continuance of—Notification, failure of—Effect of.*—In 1860 an administrator gave statutory notice of a final settlement at the next term of Probate Court. At that term he filed his settlement; but on his motion, the same was continued till the next term. No further notice was taken of the settlement till 1870, when the administrator, without further notification, withdrew his final settlement and made a different and corrected one. *Held*, that the latter settlement had no binding force on the parties interested in the estate.

Error to Louisiana Court of Common Pleas.

Ledford & Shields, for Plaintiffs in Error.

Ralls & Harison, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

This was a suit in the nature of a bill in equity, commenced by the plaintiff against the administrator and heirs of Thomas Hicklin, deceased.

From the record it appears, that in the year 1853 one Eliza Tapley died, leaving a last will, which was duly probated in October of the same year, and letters testamentary were granted on the estate to the plaintiff.

By the terms of the will, the testatrix bequeathed to Thomas Hicklin the sum of \$1,742.50, together with certain specific personal property, and also one-third of the residue of the estate.

The plaintiff, as executor, paid to Hicklin the legacy and delivered to him the personal property a short time after he took possession of the estate.

It appears, further, that in August, 1860, he advanced to said Hicklin \$1,760.98, and took his receipt therefor, in which it was specified, that after deducting whatever was coming to him as his residuary part in the Tapley estate, he was to repay the balance to the executor, with ten per cent. interest.

In 1861, the plaintiff, by a notice published in a newspaper, in pursuance of the statute, notified all persons interested in the estate, of which he was executor, that he would, at the next term of the Probate Court, make his final settlement. At the next term of this court he appeared and filed his settlement, which, on his motion, was continued to the next term.

No further action or notice of this settlement was taken for nine years. But, without any further notification whatever, in 1870 plaintiff appeared in court and withdrew his settlement filed in 1861, and then made a different and corrected settlement.

By this last settlement it was ascertained and claimed that a certain amount was due the plaintiff on account of money advanced to Thomas Hicklin, over and above what was due him as his residuary interest in the Tapley estate.

In 1860 Thomas Hicklin died, and his estate was duly administered on. The plaintiff did not, within three years, or at any other time, present any demand for allowance against Hicklin's estate, although he claimed that money was due him on account of advancing too much to Hicklin.

By an order of court, before this suit was instituted, Hicklin's administrator distributed the assets of the estate among the heirs.

The object of this proceeding was to specifically trace the money paid to Hicklin's heirs as a trust fund, and have it applied to the satisfaction of plaintiff's demand.

The court below found for the plaintiff, and rendered a judgment against the administrator, and also decreed that Hicklin's heirs should pay over certain moneys received by them from the administrator, and that upon a failure to make such payment, execution should issue.

The first question arising for decision, is whether the final settlement made by the plaintiff in 1870 is binding upon Hicklin's heirs?

The main reason why the law requires notice from an executor or administrator, that he will make final settlement of an estate, is that all parties interested may be advised, and appear at the proper time to examine the accounts and protect their rights.

In the present case the published notice was, that final settlement would be made at a certain term in 1861. At that term a settlement was filed, but no action was taken upon it. It was simply continued at the request of the executor. The whole matter was then permitted to lie for nine years. No further action or order by the court was had till in 1870, when the plaintiff, without any further publication or notice, came into court and withdrew the settlement filed in 1861, and made a new settlement, in which he made the liability of Hicklin much greater than it appeared to be in the former one. It is obvious that this practice should not be tolerated. It would lead to great abuse and injustice. It could not be reasonably expected that the parties interested in the estate would appear at every term of the Probate Court for nine years, to see whether the executor intended to make his final settlement. And these reasons have much more force in this case, where some of the parties were minors. After the lapse of such a length of time after publication was made, without taking any steps in relation to making final settlement, we think it was clearly the duty of the executor to give a new notice when he proceeded to make his final settlement.

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Our opinion, therefore, is, that there was not a sufficient compliance with the law in the matter of publishing notice; and that the settlement has no binding force on the parties interested in the estate.

Again, it is averred in the answer of the administrator, and not denied in the replication, that the administrator of Hicklin gave due notice of the grant of letters of administration to him, in accordance with the statute, and that the plaintiff did not present this claim for allowance against the estate within three years. If this is true, it is not perceived on what grounds the statutory bar can be avoided. The debt claimed to be due to the plaintiff was an advance of money made by him to Hicklin, a part of which the latter promised to refund with interest. Whatever there was found to be due was the obligation of Hicklin, and should have been presented for allowance against his estate.

The result is that the court erred in its rulings, and the judgment must be reversed and the cause remanded.

The other judges concur, except Judge Sherwood, who is absent.

—o—

PAULINE DALTON, *et al.*, Respondents, *vs.* BANK OF ST. LOUIS,
et al., Appellants.

1. *Ejectment—Possession—Limitation.*—Open, notorious, peaceable, continuous and adverse possession of land for twenty years will give a title that will authorize a recovery in ejectment.
2. *Acknowledgment—Deed with defective—Adverse possession.*—A deed, notwithstanding a defective acknowledgment, is good between the parties. It would constitute color of title, and enable persons in possession of land to avail themselves of title by adverse holding.

Appeal from St. Louis Circuit Court.

C. C. Whittelsey, for Appellants.

Cline, Jamison & Day and B. A. Hill, for Respondents.

WAGNER, Judge, delivered the opinion of the court.

A careful examination of the record has convinced us, that, the only question in this case is the statute of limitations.

The action was ejectment to recover a strip of land six feet in width off from a lot on Third street, in the city of St. Louis.

The plaintiffs' claim was finally based on prescription, and on this sole issue, the cause was submitted by them to the court. We will not discuss the evidence. The facts were for the triers, and the only thing with which we are concerned, is, did the court submit the cause under correct propositions of law? The trial was by the court without the intervention of a jury, and on behalf of the plaintiffs, the following declaration was given:

"If the court finds from the evidence in the case, that plaintiffs and those under whom they claim and derive title, have had and held open, notorious, peaceable, continuous, adverse and quiet possession of the premises sued for, twenty years immediately preceding 1856 or 1857; and that the defendants, and those under whom they claim title or possession, first entered upon and took possession of the premises sued for in 1856 or 1857, and have held possession ever since, then the plaintiffs are entitled to recover."

For the defendants the court declared the law to be, "that if defendants, and those under whom they claim, have had adverse possession of so much of the premises described in the petition as is covered by the building of defendants, and said possession was open, notorious and hostile, under claim of title, and continuous for more than ten years prior to the institution of this suit, on February 27th, 1864, then the plaintiffs cannot recover the portion of said premises so covered by said building."

The court found for the plaintiffs.

The instructions on the question of possession for the statutory period of limitation given for both parties, are entirely unexceptionable.

The declaration given for the plaintiffs is in substance the same as one that was approved by this court in the case of

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Schultz vs. Arnot (33 Mo., 172), and in that case it was distinctly held, that visible, notorious, continual and actual adverse possession of land, for the time limited by the statute, would give a title to land that would authorize a recovery in ejectment.

There is no force in the argument of defendants' counsel, that the plaintiffs' instruction assumes the facts in controversy. The instruction assumes nothing, but distinctly requires the facts to be found from the evidence. The evidence was ample to sustain the finding. It clearly appears that the persons under whom the plaintiffs claim, possessed the whole lot and had a deed therefor.

There was a defective acknowledgment to the deed, but that did not make it totally void. It was good as between the parties to it. It constituted color of title, and enabled those in possession to avail themselves of title by adverse holding. There was evidence tending to show, that the plaintiffs, or those under whom they claim, held possession of the whole lot from 1823 until 1856, when Anderson, under whom the defendants claim, broke down the fence they had erected and took possession of the strip in controversy. This evidence fully supported the verdict of the court, and we will, therefore, make no further inquiry.

The court gave for the defendants seven additional instructions and refused three, but under the view that we have taken of the case, we think they were wholly immaterial, and it is unnecessary to examine them. The issue made on the statute of limitations decides the whole case.

The judgment should be affirmed; the other judges concur, except Judge Adams, who did not sit.

Lackland, Adm'r of Nelson, v. Stevenson.

H. C. LACKLAND; Adm'r of HARRIET E. NELSON, deceased,
Appellant, vs. GEORGE STEVENSON, Respondent.

1. *Wills—Probate—Administrator, appointment of—Proofs—When contested.*—The appointment by the court of the executor named in the will, or, in case of his renunciation, of such person as the statute authorizes as administrator, with the will annexed, assumes, that the court has passed upon the sufficiency of the proofs and admitted the will to probate. But this assumption may be contested by the proper parties in due time.
2. *Wills—Probate—Wife, renunciation by—Sale of lands—Estoppel.*—A. made his will, appointing his wife executrix, but she by a written communication to the court declined to act, when an administrator with the will annexed was appointed by her consent and at her request, and the order appointing him recited that the will had been duly probated. The will was proved by the subscribing witnesses, and no objection was made to the sufficiency of the proof. It appeared by parol proof, that the widow was informed of her right to renounce the will, but declined to do so. The entry of the clerk of the court was, that the will had, "in due form of law, been exhibited, proved and recorded;" but there was no entry of any formal judgment of probate. Five years after the death of the testator the land conveyed in the will to the wife was sold by the administrator by order of court to pay the debts of the estate, and, seven years after the sale, the wife renounced the will and sued for dower in the land. *Held*, that the conduct of the wife amounted to an estoppel *in pais*.

Appeal from St. Charles Circuit Court.

Lackland and Broadhead, for Appellant.

I. It devolved upon the defendant to show a will conveying real estate to the wife duly probated, and that one year had elapsed since the completion of the probate thereof. (W. S., 541, §§ 15, 16.) The will offered in evidence was not proved or probated, as required by law. (W. S., 1366, §§ 13, 15.) Neither clerk nor court passed judgment upon the will; and it was not admissible in evidence. (W. S., 1367, § 26; *Charlton vs. Brown*, 49 Mo., 353; *Creasy vs. Alverson*, 43 Mo., 13; *Milan, Adm'r vs. Pemberton, Adm'r*, 12 Mo., 598.)

II. The widow must file her renunciation of the will "within twelve months after the proof of the will." The word proof is there synonymous with probate, and the statute must mean within twelve months after the proof is received and closed up by a judgment of probate.

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III. The records of the probate court are open to the whole world; and the administrator and purchasers are bound to know at their peril the law and the condition of the title. (Tapley vs. McPike, 50 Mo., 589.)

W. A. Alexander, for Respondent, claimed, setting out the facts:

I. The widow was estopped from claiming dower.

II. There was sufficient evidence of the probate of the will, and that the formal entry is seldom made.

NAPTON, Judge, delivered the opinion of the court.

This is a suit for dower. The plaintiff was the widow of John W. Nelson, who died in 1860, and died seized of certain lands in the county of St. Charles. She claims in her petition, that no dower has been assigned to her, and that she is entitled to one-third for life in said real estate.

The defendant for answer, after admitting death and seizure, &c., sets up; that said Nelson made a will, which was duly proven and probated and recorded, and letters testamentary granted thereon; that by said will the testator left his widow seven slaves and other personal property and also all his lands, and among other lands, that in which she now claims dower; that the plaintiff never renounced said will in the time and mode provided by law; that the plaintiff took the personal property and possession of the lands and received the rents and profits thereof until 1865, when it became necessary to sell said lands to pay the debts of testator; that the defendant was the purchaser at said sale, and has been in possession under said purchase ever since.

The ground, upon which the plaintiff claims a right to dower in this land, notwithstanding the will, and notwithstanding its renunciation took place twelve years after the death of the testator and nearly that time after the grant of letters testamentary, is that no judgment of probate appears to have been entered on the records of the court. The 15th section of the act concerning Dower (R. C., 1855, p. 671), provides, that a devise of real estate to the wife shall bar dower

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in real estate, unless the will otherwise declares; and the 16th section provides, that in such cases the wife is barred of dower, unless, by a writing duly executed and acknowledged, and filed in the office of the court, in which the will is proven and recorded, within twelve months after proof of the will, she renounces the provisions of the will.

The testimony in this case shows, that under a commission from the County Court the two subscribing witnesses to the will were examined, and the depositions returned into court, and no objections were made to the sufficiency of the proof. The will was then recorded in the book appropriated to the records of wills, with the proofs annexed. An administrator with the will annexed was appointed by the consent of the plaintiff and at her request; she preferring not to act, and so declaring in a written communication to the court. The estate was for several years in the course of administration, during which time the land decreed to the widow was sold for payment of debts, and a deed made.

It appears from the parol proof in the case, that the widow was duly apprised of her right to renounce the will, but declined doing so. It also appears, that this land was ultimately sold for payment of debts by order of the court, the sale approved, and a deed made. The slaves, of course, became valueless, though they were hired out until their emancipation. The hardship of the case to the widow is obviously owing to circumstances which the history of those times sufficiently explains. The renunciation of the will was finally made in 1872, about twelve years after the death of the testator, and nearly that time after the appointment of an administrator, and seven years after the land was sold.

The records of the court showed, that, in the order appointing an administrator with the will annexed, it was recited that the will had been duly probated, and the certificate of the clerk in his letters testamentary states, "that the last will of John W. Nelson, deceased, hath, in due form of law, been exhibited, proved and recorded;" but there is no entry on the records of any formal judgment of probate. It is therefore

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insisted, that, as there has been no proof of the will, the widow is not barred from her dower.

Our statute allows five years within which parties are allowed to contest a will, and here more than twice five years have elapsed, during which the probate court and the clerk and the administrator and the plaintiff have all acted on the assumption of a probated will. This would seem to be a strong case of estoppel,—by acts *in pais*—even if the record showed no sufficient entry of a judgment. The statute, which limited the time within which a widow should be allowed to renounce the will of her husband, was not designed to hurry her into any precipitate decision, and, therefore, allowed her a year from the proofs of the will; but it is evident, that there was no intention to grant an indefinite period, during which creditors and purchasers and legatees might acquire rights as sacred as hers. For all purposes connected with this case, the appointment of an administrator with the will annexed, reciting the due proof of the will, made to a person whose rights were subservient to those of the widow, and made upon a communication from her that she did not wish to execute the will, and preferred the one appointed, is a record admission of the probate—although, in form, the records do not show such probate.

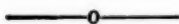
It is probable, that the records of probate courts, in many cases, do not show a regular and formal judgment upon wills, but simply a record of the will and the proofs of its due execution, without any specific action of the court, or formal judgment of the court upon such will and the proofs to establish it.

The appointment by the court of the executor named in the will, or, in case of her renunciation, of such person, as the statute authorizes, as administrator with the will annexed, assumes, that the court has passed upon the sufficiency of the proofs, and admitted the will to probate. Doubtless this assumption might be contested by the proper parties in due time. In this case the administrator was allowed to progress, with the assent of the plaintiff, and the land in question to

State to use of Bolenius v. Waters, et al.

be sold under the administration five years after the death of the testator, and seven years more elapsed before renunciation was made and this suit brought.

Judgment affirmed. The other judges concur.



STATE OF MISSOURI to use of JULIUS BOLENIUS, Plaintiff in Error, vs. WILLIAM W. WATERS, *et al.*, Defendants in Error.

1. State to use of Hunter vs. Maulsby, 53 Mo., 500, affirmed.

Error to New Madrid Circuit Court.

Louis Houck, for Plaintiff in Error.

I. In this case the parties to the contract are sued by the administrator *de bonis non*; hence, this case does not fall within the words of Sess. Acts 1865-6, p. 85.

II. The Circuit Court based its decision upon Dodson vs. Scroggs, 47 Mo., 285, but that case does not bear out the court's ruling.

R. A. Hatcher, for Defendants in Error.

VORIES, Judge, delivered the opinion of the court.

This case is similar in all of its material features to the case of "The State to the use of Isaac Hunter, Adm'r of Robert B. Hill, deceased, against Lemuel Maulsby, William Edmondson, Lewis Purcell and Edward H. Coleman, decided at the present term of this court, except that the petition is more specific in its allegations, and the judgment is rendered against the relator in his representative capacity, and for the reasons given in that case, the judgment is reversed and the cause remanded.

The other judges concur, except Judge Sherwood, who is absent.

Ochiltree v. Iowa R. R. Contracting Co.

GEORGE M. OCHILTREE, Plaintiff in Error, *vs.* THE IOWA RAILROAD CONTRACTING COMPANY—Stockholder in MISSOURI, IOWA & NEBRASKA RAILWAY COMPANY, Defendant in Error.

1. *Corporations—Double liability clause, repeal of.—Liability of Stockholder.—*

A stockholder in a corporation, who becomes such, after the repeal of the double liability clause in the State constitution of 1865, (See Art. VIII, § 6) is not liable in double the amount of his stock, for debts owing by the corporation prior to the repeal.

Error to Clark Circuit Court.

James Hagerman, for Plaintiff in Error.

I. Under the law in force when the plaintiff's debts accrued, and at the date of consolidation, when "The Missouri, Iowa & Nebraska Railway Company" became obligated to pay the same, the stockholders existing at the time of the issuing of execution were liable under "double liability clause." (G. S., 328, §§ 11, 12; Constitution 1865, Art. 8, § 6; McClaren *vs.* Franciscus, 43 Mo., 452.)

II. The constitutional amendment of 1870, Sec. 6, Art. 8, as applied to debts existing against corporations at the time of its adoption, is null and void, in that it impairs the obligation of contracts within the meaning of Sec. 10, Art. 1, of the Constitution of the United States. (Green *vs.* Biddle, 8 Wheat., 1; Bronson *vs.* Kinzie, 1 How., 311; McCracken *vs.* Hayward, 2 How., 608; Woodruff *vs.* Trapnall, 10 How., 190; Curran *vs.* State of Arkansas, 15 How., 304; Corning *vs.* McCullough, 1 N. Y., 47; Conant *vs.* Van Schaick, 24 Barb., 87; Hawthorne *vs.* Calef, 2 Wall., 10; Von Hoffman *vs.* City of Quincy, 4 Wall., 535; Gunn *vs.* Barry, 15 Wall., 610.)

III. A contract can no more be impaired by Constitutional amendment than by statute. (Dodge *vs.* Woolsey, 18 How., 331; State of Missouri *vs.* Cummings, 4 Wall., 277; In the matter of Oliver Lee & Co's Bank, 21 N. Y., 9; State *vs.* Miller, 50 Mo., 129.)

IV. The fact that defendant became a stockholder in the "Missouri, Iowa & Nebraska Railway Company" after constitutional amendment of 1870 cannot effect plaintiff's rights.

(Marey vs. Clark, 17 Mass., 329; Von Hoffinan vs. City of Quincy, *supra*.)

V. Section 8, Art. 6, of Constitution of 1865, known as "double liability" clause applied to all corporations existing and subsequent. (Oliver Lee & Co's Bank, 21 N. Y., 9; Reciprocity Bank, 22 N. Y., 9.)

VI. This "double liability clause," as applied to corporations existing at the time of its adoption, did not violate any contract on the part of the State with the corporation or its stockholders. (Gray vs. Coffin, 9 Cushing, 192; Coffin vs. Rich, 45 Maine, 507; Milliken vs. Whitehouse, 49 Me., 527; Hawthorne vs. Calef, 53 Me., 471; Peele vs. Phillips, 8 Allen, 86; Ang. & Ames on Corp., § 612, (8th Ed.); Abbott's Dig. Cor. Title "Legislation" pp. 444-5-6; Peters vs. St. Louis & Iron Mountain R. R. Co., 23 Mo., 107; Gorman vs. Pacific Railroad, 26 Mo., 441; Stanley vs. Stanley, 26 Me., 191.)

F. T. Hughes, with whom were Bland & Baker, for Defendant in Error, filed an elaborate argument to show, that the charter of the Alexandria & Bloomfield R. R. Co. exempted it from the operation of the General Statute relating to the liability of stockholders; and then argued in substance as follows:

I. Assuming for the argument, which we do not admit, that the stockholders in the A. & B. R. R. became subject to the double liability as created by the constitution of 1865, yet, notwithstanding this, the defendant in this case is not liable under that provision of the constitution; or the law passed in 1866.

II. By the agreed statement of facts submitted with the record in the case, it is admitted; that the defendant was not a stockholder at the time the debt was created; and that the stock now owned by defendant was originally subscribed for, issued, and paid up, after the adoption of said amendment.

III. The plaintiff cites and relies upon McCracken vs. Hayward, (2 How., 608,) and Hawthorne vs. Calef, (2 Wall., 10.) The case of Hawthorne vs. Calef is entirely dissimilar to the case at bar, for in that case the defendant was a stockholder when the debt was contracted, and during the existence of

the law creating the liability, and continued to own and hold the stock after the law was repealed, and until after execution is issued; so that it formed a complete case to which the doctrine could apply. The case of *McCracken vs. Hayward* only decides, that a law seriously affecting the remedy for the collection of a debt is, as to existing creditors, void. But that decision cannot apply to this case; for at the time the debt was contracted, this defendant was not a stockholder; nor is it now the assignee of any stock then held or owned by any one in the company; nor was it a stockholder at any time during the existence of the law creating the liability sought to be imposed. The plaintiff did not give credit to the defendant, nor to any one of whom the defendant is a representative or assignee. The defendant by becoming a stockholder did not diminish the assets of the company, destroy any stock then in existence, or take from any stockholder then owning stock in said company any liability to pay plaintiff's debt. The case of *M'Laren vs. Franciscus*, (43 Mo., 452,) does not aid the plaintiff. It only decides, that the stockholders, who are such at the time of execution, and not those who were such at the time the debt was contracted, are liable. It does not attempt to decide what the measure of such liability is. That was not in the case presented for the consideration of the court, and could not be, for the defendant there was a holder of stock which was issued to and held by his assignor at the time the debt was created, and held at the time the law was in force creating the liability, etc. Therefore, we say, that, while the court decides who are liable, it does not decide the rule by which such liability is measured.

IV. The case of *Curtis vs. Harlow*, 12 Met., (Mass. 3), was relied upon and strongly urged by the plaintiff in the trial below. There is nothing in that case which will apply to the case at bar. It is similar to the case of *M'Laren vs. Franciscus*, and decides the same point.

V. We claim that as the stock was original stock, and issued after the debt was created, and after the liability was changed, it could not have been any part of the inducement which

caused the plaintiff to give credit to the corporation. There is no privity between the plaintiff and the defendant. The defendant was not in any way a party to the contract of indebtedness, nor is he the representative or assignee of any such party.

VI. It is also claimed by the plaintiff that, as the defendant became a stockholder in the corporation with a full knowledge of its indebtedness, and was permitted to partake of its benefits, he became liable for its debts. If the defendant had purchased stock already in existence, and affected with the liabilities created under a former law, this reasoning would be sound. It would then fall within the rule of *Curtis vs. Harlow*, *supra*. But as the defendant became a stockholder by original subscription after the constitution had repealed the double liability, it is sound to presume that it relied upon the law as then in existence for the measure of its liability.

VII. A subscription of stock to a corporation is a contract, and the law, fixing the liability of the subscriber as it exists at the date of the subscription, enters into and forms a part of the contract. (*Ireland vs. Palestine Turnpike Co.*, 19 Ohio St., 369.) When the defendant subscribed for this stock, the law imposed no double liability upon him, and it is a violation of the obligation of his contract to make him liable under any other law than the one then in existence, whether that law was a prior, but repealed one, or a subsequent one. (*Sturges vs. Crowninshield*, 4 Wheat., 122, cited and approved by *Thompson J.*, in *Ogden vs. Saunders*, 12 Wheat., 213.)

NAPTON, J., delivered the opinion of the court.

The only question in this case, necessary to be decided, is, whether a stockholder in a corporation, who becomes such after the constitutional amendment of Nov. 1870, is liable to the double liability imposed upon its stockholders by the 6th Sec. of Art. 8 of this constitution of 1865, and the provisions of the statute made to carry this constitutional provision into effect.

The position is assumed and maintained by an elaborate and able argument of counsel, that the liability extends to the

stockholders subscribing after the repeal of the double liability clause as to all debts contracted by the company before the repeal, and to support this position the case of *Hawthorne vs. Calef*, 2 Wall., 10, is specially relied on.

The argument is based on the doctrine, that the rights of creditors cannot be impaired by subsequent legislation, which the case cited abundantly establishes, as well as other decisions by the same court.

But what were the creditors' rights under the double liability statute? Did they go beyond a right to subject the existing stockholders to this provision in the nature of a penalty? Had the creditors any right to anticipate an additional responsibility which did not exist when they gave the credit?

The law which subjected the stockholder to the double liability was in the nature of a penalty (*Kritzer vs. Woodson*, 19 Mo., 327), based upon considerations of public policy, and liable to be repealed upon like considerations. It could only be enforced in the mode and time, and against the parties subjected to it.

The defendant was not a member of the corporation when this law was in force; he became such after its repeal and when the law only subjected his stock to the creditors. It is conceded in the agreed case, that the defendant had paid up his stock, and that, of course, like other assets of the corporation, was liable to the debt. It cannot be implied, and certainly was not expressed in his subscription, that it was his contract to assume a liability which neither the law nor his contract imposed. To so construe it would be wholly unwarranted.

The case of *Marey vs. Clark*, 17 Mass., 329, is relied on, and the opinion of the court in that case is quoted, which says: "As to those who became members after judgment against a corporation, or after a debt has accrued, they voluntarily subject themselves to the inconvenience, having the means to satisfy themselves of the solvency of the company if they choose to make inquiry.

Those who become inhabitants of a town after a liability for

debt is incurred, are in the same predicament, and the case of *Hoffman vs. The City of Quincy*, 4 Wall., 535, is to the same effect. But those decisions are not applicable.

It is clear, that a person, who moves to a town or city, subjects himself to such taxation as all other citizens are liable to, and that a new stockholder in a corporation makes his stock liable to its debts though antecedent to his membership.

But something more than this is claimed here. It is claimed, that the new stockholder not only makes the property he puts in the corporation liable to its debts, but assumes a personal responsibility which neither the law nor his contract created. That such a law existed before he subscribed is certainly no ground for the presumption, that he had any thought of incurring this personal responsibility at the time of his subscription, seeing that it was repealed.

The creditor cannot complain that any of his rights have been taken away, for when his debt accrued he had no claim whatever against the defendant. His rights against the corporation and its members remain just as they were, and the new subscription, in fact, increases the capacity of the company to pay the debt.

But the personal liability, which he seeks against defendant, has no existence, and had none when the defendant became a stockholder in the company.

Another question was discussed in this case, whether this double liability clause ever did apply to the R. R. company in which defendant took stock, and whether its charter did not exempt it from the provisions of the general statute on this subject. But upon the view we have taken of the first point it is unnecessary to examine this question.

The judgment is affirmed. All the other judges concur.

ISAIAH H. POE, *et al.*, Appellants, *vs.* ANTOINE DOMEQ, *et al.*
Respondents.

1. *Witnesses—Statute touching—Party dead, other party may testify as to, what.*—In a suit based upon a series of contracts and transactions, the fact that a party to the suit made some of the contracts with one since dead will not under the Witness Act (W. S., 1372, § 1), disqualify him from testifying to other transactions occurring subsequent to the decease.
2. *Depositions, notice of—Service on attorney who was co-defendant.*—Notice of deposition served upon one who was the attorney of record of all the defendants is sufficient service on them, and is in nowise invalidated by the fact that the attorney was also co-defendant.
3. *Limitations, statute of—Infancy—Entry—Action may be commenced, when.*—Parties to a suit for the recovery of land, who were infants when their right of action or entry first accrued, may commence their action or make an entry within three years after their disability has been removed, if that event does not occur more than twenty-four years after the accrual of the right.
4. *Trusts and trustees—Limitations, statute of—Claim of title by trustee independent of the trust.*—When a trustee denies the trust and openly claims the trust property by a title independent of the trust and adversely to the claim of the beneficiary, the statute of limitations will run in his favor.

Appeal from Cape Girardeau Circuit Court.

Lewis Brown, for Appellants.

I. The statute of limitations, has never been permitted to be pleaded in bar of a trust, to cover up a mistake, or to take the benefit of a fraud by the party pleading it. (1st. Danl. Ch. Pr. [3d Ed.] 666, *et seq.*; Kane vs. Bloodgood, 8 Johns. Ch., 90; Keeton vs. Keeton, 20 Mo., 530; Johnson vs. Smith, 27 Mo., 591; Fugate vs. Pierce, 49 Mo., 441; Ang. Lim. [4 Ed.] § 384 and notes.)

II. The statutes and the repeated rulings of this court, are against the admissibility of defendant Poe's evidence for any purpose whatever—"in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, * * * the other party shall not be admitted to testify in his own favor. (2 W. S., 1372, § 1; Stanton vs. Ryan, 41 Mo., 510; Johnson vs. Quarles, 46 Mo., 423; Anderson vs. Hance, 49 Mo., 159.)

Louis Houck, for Respondent.

I. The defendant Poe was a competent witness under the

statute. The issue on trial here was not the contract between the defendant Poe and his son W. H. Poe. The issue was: Did defendant Poe destroy the deed he made, (appellants assume the existence of the contract,) after the death of his son? (*Looker vs. Davis*, 47 Mo., 140.)

II. The statutes of limitations, even assuming that defendant Poe was guilty of the frauds alleged, were a complete bar to the action of the plaintiffs.

III. In order to avoid the statutory bar, it was incumbent on the appellants to show, that they came within the saving clause of the statute. Appellants failed to do so.

IV. The defendant Poe was in the actual possession of the property from 1845—the time of the death of Hastings—to the time of sale to Domic in 1868. Nor did he pay any rent to Mrs. Barbara Poe, the widow, for the land. He at one time shortly after the death of Hastings Poe, handed her three dollars, and then said “there is the money for the rent of your house,” and this amount was paid in 1845, more than 27 years ago.

V. The rule is: “Whenever a person takes possession of property in his own name, and is afterwards by matter of evidence, or construction of law, changed into a trustee, lapse of time may be pleaded in bar.” (*Keeton vs. Keeton*, 20 Mo., 531; *Perry Trusts*, §§ 229 239.)

VORIES, Judge, delivered the opinion of the court.

This was a suit in chancery commenced in the Cape Girardeau Circuit Court.

The charges in the petition are substantially, that sometime in the year 1832, one William H. Poe entered upon lands described as “ont lot number fifty-three situate near the city of Cape Girardeau, said lot being part of the confirmation made to Lewis Lorimer, and in survey number two thousand one hundred and ninety”; that said William H. Poe resided on said lands claiming them as his own openly, adversely and notoriously, which notorious possession under color of title and claim of right, was notorious in the community up to the date of his death in the year 1845; that when

he died he left his widow Barbara E. Poe, his daughter Sarah E. Poe (since intermarried with Oscar E. Pruny,) and Isaiah H. Poe as his only heirs and representatives; that on the first day of September 1869, the said heirs for a valuable consideration conveyed one undivided half of said lands to George G. Kimmel and Lewis Brown their co-plaintiffs; that the said William H. Poe at the time of his death was seized and possessed of said land in fee simple, and left his said heirs in the peaceable and lawful possession thereof; that sometime prior to the death of said William H. Poe, the defendant Isaiah Poe duly made and delivered to the said William H. Poe and his heirs, for a good consideration, a conveyance of said land by covenants of general warranty; that by the fraud and deceit of said defendant Isaiah Poe, said conveyance was never put upon the records of said county; that after the death of said William H. Poe, the defendant Isaiah Poe, intending to cheat and defraud, said heirs, did in violation of law procure himself to be appointed administrator of the estate of said William H. Poe; that in furtherance of said fraud, said Isaiah Poe failed to take the oath required of him as such administrator; that he failed to make a full, true or perfect inventory of said land and the effects of said estate; that in furtherance of said fraudulent intent, he did demand and receive all of the books, papers and vouchers belonging to said estate, of and from the said Barbara E. Poe—among which, was the conveyance of said land by him to said William H. Poe; that after he had so fraudulently obtained the possession of said conveyance, he fraudulently destroyed the same and failed to put said conveyance in the schedule of the property of said estate; that as the administrator of said estate, in the year 1846 he took possession of said land, and has ever since received the rents and profits thereof, and has failed to account therefor.

The petition alleges that on the 15th day of August 1869, the said Isaiah Poe further intending to cheat and defraud the heirs of said estate, did pretend to sell and convey said land to said Antoine Domic; that said Antoine Dom-

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ic well knowing all of the facts aforesaid, did fraudulently pretend to purchase the same from said Poe; that all of said facts were and are of general notoriety; that the reasonable worth of the yearly rents of said land is two hundred dollars per annum. Wherefore it is prayed, that the conveyance from Isaiah Poe to Antoine Domic as aforesaid, be declared null and void; that the title to said land be adjudged in the plaintiffs, and that they have judgment for the rents and profits, at the rate of two hundred dollars per year, from 1846, and further, there is a prayer for general relief.

To this petition the defendants answered separately. The defendant Isaiah Poe by his answer denies all of the material allegations in the petition, except that he admits that he has been in the exclusive possession of the land in controversy ever since the year 1846, and avers that he was in the possession of the same for a number of years prior thereto. He then sets up the statute of limitations averring that neither the plaintiffs or their predecessors or those under whom they claim have been seized or possessed of the land for more than ten years before the commencement of the suit. He also sets up as a defense that no right of action accrued to plaintiff's within twenty years before the filing of the petition.

The defendant Domic by his answer denies all of the material allegations in the petition which could effect his rights, and claims to be an innocent purchaser of the land in question for a full consideration without any notice of the plaintiffs' claim, or that they pretended to claim any right or interest in the land. He also pleads that no right of action has accrued to plaintiffs within twenty years before the filing of the petition, and also, that none has accrued within five years, and that neither the plaintiffs, their predecessors or ancestors, or any person under whom they claimed had been seized or possessed of the land or any part thereof, for more than ten years before the commencement of the suit.

The plaintiffs replied to the answer of the defendant, Domic, denying the new matter set up therein. No replication was made to the answer of defendant, Poe.

Afterwards a trial was had, and the court, after hearing the evidence, found for the defendants, and dismissed plaintiffs' bill rendering judgment against them for costs.

The plaintiffs in due time, filed a motion for a new trial, on the ground, that the finding and judgment were against the law and were against the evidence; and that the finding was for the wrong party, as shown by the evidence.

This motion for a new trial being overruled by the court, the plaintiffs again excepted and appealed to this court.

With the view that I entertain of this case, it will only be necessary to pass upon one question in the case; and it will only become necessary, in a general way, to refer to the evidence in the cause. There is a great mass of evidence, but it tends to prove but few facts. It may, however, be proper to refer to a preliminary question arising in the case, before the consideration of the main question involved.

Before the commencement of the trial the plaintiffs moved the court to suppress the deposition of the defendant Poe, taken and filed in the cause by defendants.

The grounds relied on to suppress the deposition, were, First—That the defendant Poe, was not competent to testify in the case, for the reason that the deed, attempted to be established in the case, was charged to have been executed by said witness to William H. Poe, who it was admitted was dead; and Second—That it appeared that no notice had been given of the time and place of taking the depositions to part of the defendants.

The court sustained this motion, so far as to suppress all of the deposition that related either to the execution or delivery of the deed in question, and overruled the motion as to other parts of the deposition. The defendant contends, that the whole of the deposition should have been excluded; that by the statutes of this State (Wagner's Statutes, 1372, § 1), the defendant Poe, was wholly incompetent to testify to any facts in the case. The statute provides, that "No person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event

of the same as a party, or otherwise; but such interest may be shown for the purpose of effecting his credibility; *provided*, that in actions, where one of the original parties to the contract or cause of action in issue and on trial, is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor," &c. It will be seen, that all parties are made competent witnesses by this section of the statute, but where one of the parties to a contract in issue is dead, the other party shall not be permitted to testify in his own favor. It was not intended by the statute, that in cases consisting of a series of contracts and transactions, each of which were put in issue by the pleadings, some of which transactions had been had with a party who had since died, and others of the transactions had been had with others, or consisted of facts which had taken place since his death, the party living should be excluded from testifying to facts occurring since the death of the party to the first transaction. Such an exclusion would be wholly outside of the object and intention of the legislature. The object of the law was to prevent one party from testifying to a contract in issue, where the lips of the other party were closed, so that his version of the contract could not be given; but it could answer no valuable purpose to exclude a party from testifying to facts about which the dead party knew nothing in his life-time, and which was wholly transacted with others. (*Stanton vs. Ryan*, 41 Mo., 510.)

The ruling of the court was proper on this motion, in excluding the evidence which related to the deed named in the petition; but on the trial, evidence was read from the deposition, of a contract between the witness and his son, different from the contract in issue in the pleadings. This was wrong; but the tendency of the evidence was strongly against the defendant, and could have no bearing whatever, on the issue upon which this case must be decided; it could do the party no injury, and will be disregarded.

In reference to the notice given of the time and place of taking the deposition, the objection is, that it was only served

on defendant Brown, who was also the attorney of record for all the defendants in the case.

This would be good if Brown had only been the attorney of the parties, and it cannot be seen why his being a joint plaintiff, as well as the attorney of the parties, would make the notice less effectual. He was present and cross-examined the witness, and that was all that was required.

The main question in this case, and the matter on which the defendants seem to rely, is the statute of limitations. It is quite clearly shown, that the defendant Isaiah Poe, had some kind of a written contract with his son, William H. Poe, in reference to fifty acres of the land in controversy; but the nature is not ascertained or ascertainable from the evidence in the cause, unless we take the statement of defendant Poe, and with said statement, it cannot be told what particular part of land the young man was to have, even on the conditions stated by the old man.

The evidence fails to show that defendant Domec, had any notice of the right or claim of the plaintiffs in or to the land in controversy, at any time before his purchase of the land. But the evidence does show, that defendant Domec, still owes his co-defendant, Poe, eleven or twelve hundred dollars on the eighty acres of land in controversy; and that he purchased the land for a fair consideration, and had, without notice of plaintiffs' claim or right, paid about twelve hundred dollars on the same.

It is hardly necessary to say, that if the statute of limitations were not interposed, under a proper bill, the plaintiffs might at least recover for the improvements made on the land out of the purchase money unpaid to defendant Poe, by Domec.

The difficulty, however, in the way of any recovery in this case, is the statute of limitations.

The statute provides (W. S., 915, § 1), that "No action for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof, shall be commenced, had or maintained by any person, whether citizen, denizen,

alien, resident or non-resident of this State, unless it appear that the plaintiff, his ancestor, predecessor, grantor or other person under whom he claims, was seized or possessed of the premises in question, within ten years before the commencement of such action, except in cases of military bounty lands, which shall be within two years." By the fourth section, it is provided, that "If any person entitled to commence any action in that chapter specified, or to make any entry, be, at the time such right or title shall first descend or accrue, either within the age of twenty-one years, or insane, or imprisoned on any criminal charge, or in execution upon some conviction of a criminal offense for any time less than life, or a married woman, the time during which such disability shall continue, shall not be deemed any portion of the time in this chapter limited for the commencement of such actions or the making of such entry; but such person may bring such action or make such entry after the time so limited, and within three years after such disability is removed; *provided*, that no such action shall be commenced, had or maintained, or entry made by any person laboring under the disabilities specified in this section, after twenty-four years after such cause of action, or right of entry, shall have accrued."

The statutes of the State have been substantially the same since the act of 1847, and must govern this case. (*Billion vs. Walsh*, 46 Mo., 492.)

The plaintiffs had a right, in this case (if they were infants when the right of action or entry first accrued), to commence their action or make an entry within three years after their disability was removed, if that was not more than twenty-four years after the right accrued.

It will be seen, by the evidence in this case, about which there is no controversy, that William H. Poe died in the fall of 1845, leaving two of the plaintiffs as his heirs, who were then small children. Their age is not exactly shown, except that one of them is shown to have been 28 years old at the time of the trial. By this evidence it is clearly shown, that the disability of infancy had been removed more than three

years before the commencement of the suit; and that it had also been more than twenty-four years since the right of action had accrued, if it accrued shortly after the death of their father.

It is, however, contended by the plaintiffs, that the defendant Poe, took possession of the land in controversy, after the death of his son, as his administrator; and that he held such possession as a trustee for the benefit of plaintiffs.

It is true, that the statute of limitations does not run in favor of one who holds property in his possession under an express trust. This possession in such case is consistent with the claim of those who are the beneficiaries in the trust property. But where the trust is not an express trust, but only implied by law or results on the ground of some fraud on the part of the trustee, and must be declared by a court of chancery, or where the trust is openly denied by the trustee and he openly claims by a title independent of the trust and adversely to the claim or right of the beneficiary, then the statute will run. (1 Daniel's Ch. Pl. & Prac., 668, 669; Keeton vs. Keeton, 20 Mo., 530.)

In this case the evidence tends to show, that immediately after the death of William H. Poe, the defendant Isaiah Poe, recognized a right or interest in the children of the deceased in the land in controversy; but it is clearly shown by the evidence, that in a few days after the death of his son, he claimed the land as his own; that he refused to inventory the land as the land of his son, but rented, controlled and used the land as his own, exercising the ordinary acts of ownership over it up to the time that he sold it to defendant Domec, in the year 1869; and that Domec has had possession of it ever since. There is no evidence that any of the plaintiffs ever claimed the land or disputed the title of old man Poe to the land, until about the time of the commencement of this suit—a period of twenty-five or twenty-six years.

I think the court below properly dismissed the plaintiffs' bill.

The judgment will be affirmed; the other judges concur, except Judge Sherwood, who did not sit.

Coop v. Northcutt.

N. H. COOP, Plaintiff in Error, *vs.* JOHN NORTHCUTT, Defendant in Error.

1. *Practice, civil—New trials—Newly discovered evidence—Affidavit.*—The granting of a new trial on the ground of newly discovered evidence, is a matter largely resting in the sound discretion of the court trying the cause, and the overruling of the motion is no error, where the plaintiff's affidavit does not show due diligence, nor why he could not have procured this evidence at the trial.
2. *Practice, civil—Errors of the clerk—When corrected.*—The mistakes and clerical errors of the clerk of the court can be corrected at any time.

Error to Washington Circuit Court.

J. R. Arnold, for Plaintiff in Error.

G. I. Van Alen, for Defendant in Error.

I. The correcting of a clerical error of the clerk in the judgment was right. (Gibson vs. Chouteau, 45 Mo., 170; Turner vs. Christy, 50 Mo., 145.)

II. There was no merit in the motion for a new trial. (Whittel. Mo. Prac., 461, and cases cited; Jaccard vs. Davis, 43 Mo., 535.)

WAGNER, Judge, delivered the opinion of the court.

The objections raised in this case are unsubstantial, technical and frivolous. The action was originally instituted before a justice of the peace under the statute in reference to the claim and delivery of personal property.

The defendant had judgment, and on an appeal to the Circuit, where the trial was before a jury, the verdict was again in his behalf. Upon this verdict judgment was rendered. No instructions were asked for or given on either side, and no objections were made to any ruling of the court in the progress of the trial.

At the same term plaintiff filed a motion to set aside the verdict and grant him a new trial, for the reasons, that the verdict was against the weight of evidence; that some of the witnesses for the defendant swore falsely; and that after the trial he had discovered new evidence. This motion was continued over to the next term, and then overruled. The first

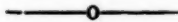
two reasons assigned in the motion cannot be considered in this court, and the third was a matter resting principally in the sound discretion of the court trying the cause.

The affidavit accompanying the motion did not show any diligence on the part of the plaintiff, nor show any good reason why he could not have found the evidence, and procured it to be used on the trial. We, therefore, see no error in the action of the court in this regard. At the next succeeding term of the court after the motion was overruled, it being the third term after the judgment was rendered, it was discovered that the clerk, in writing up the judgment, had made a clerical error by writing the word plaintiff where it should have been defendant.

The court ordered the mistake to be rectified. The plaintiff objected, and then filed his motion to set aside the judgment on the ground, that such alteration was illegally made, and on the further ground, that the court erred at the preceding term in overruling his motion for a new trial.

That the mistakes and clerical errors of the clerk can be amended and corrected at any time, is a principle too well settled to require argument or the citation of authorities. The judgment became final at the previous term, and hence no motion would lie to affect it at the time the last motion was filed.

With the concurrence of the other judges, the judgment will be affirmed.



CHRISTOPH WEEKE, Respondent, *vs.* GEORGE H. SENDEN,
Appellant.

1. *Practice, civil—Chancery cases—Issues referred to jury—Whether their verdict can be examined in Supreme Court.*—The verdict of a jury, upon issues referred to it by the court in a chancery case, is not properly reviewable in the Supreme Court. The lower court may disregard the verdict, and decide upon the issues, or may refer them to another jury (W. S., 1041, § 13).

Appeal from St. Charles Circuit Court.

Dandt, and Orrick & Emmons, for Appellant.

Theodore Bruere, and W. A. Alexander, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in chancery for the settlement of a partnership account, in which the plaintiff claimed a large balance due him from the defendant.

The defendant as a bar to the action set up, that there had been a final and complete settlement between the parties; and denied the material allegations of the petition.

The court referred certain issues to be tried by a jury. The main issue so referred was, whether there had been a settlement between the parties of their partnership business. The verdict of the jury on the issues was in favor of the plaintiff.

The case was then referred to two referees to examine into, and report upon, the partnership accounts.

The referees appear to have made a patient and exhaustive examination of the case, and made a report of the result of their labors, with a balance sheet showing the condition of the firm at the time of the dissolution, and reporting a balance in favor of the plaintiff.

Exceptions were duly filed to this report, and, upon final hearing of the case were overruled, and a judgment entered in favor of the plaintiff against the defendant for the balance found due by the referees.

A motion for a new hearing was filed, and overruled. With this motion affidavits of newly discovered evidence were filed, and were considered by the court in overruling the motion. The defendant duly excepted to the several opinions of the court, and has appealed to this court.

I have carefully examined the record and find nothing which would warrant us in sending the case back.

The verdict of the jury on the issues is not properly examinable here. In this class of cases the court, acting as a chancellor, may take the opinion of a jury on issues arising in

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the cause, but such verdict is not conclusive on the court. The court may set it aside, and submit the issues to another jury; or disregard the verdict, and pronounce upon the issues on the final hearing. (W. S., 1041, § 13.)

I see nothing in the evidence, that would warrant us in declaring that the issues were not properly found and pronounced upon by the jury and court. The same remarks may be made in regard to the report of the referees. The exceptions, in my judgment, were properly overruled.

The evidence alleged to have been newly discovered, was of the same character that had been given on the trial, and was no cause for setting aside the finding or the report of the referees. Upon the whole record as it stands before us, the judgment was for the right party.

Judgment affirmed. The other judges concur.

—o—

PATRICK NAPPER, Plaintiff in Error, *vs.* WILLIAM BLANK, Defendant in Error.

1. *Bills and notes—Maker—Indorser—Demand and notice of dishonor.*—To bind an indorser on a note, due demand and notice of dishonor must be proved, but the maker thereof is liable, whether there be a demand of payment or not.

John L. Thomas & Bro., for Plaintiff in Error.

Thos. C. Fletcher and Jos. J. Williams, for Defendant in Error.

The briefs of the counsel for both parties are necessarily omitted, because the points urged therein are not discussed in the opinion of the court.

ADAMS, Judge, delivered the opinion of the court.

This was an action by the plaintiff, as holder, against the defendant, as indorser, of a negotiable promissory note.

The note, as set forth in the petition, bears date as of the 28th of June, 1870, and was made payable to the order of the

defendant, or bearer, two years after the date thereof, for four hundred and sixty dollars. The maker of the note was Wm. Rouff.

The petition alleges, that the defendant, before maturity of the note, indorsed and transferred it to one Frederick Butz; that when the note become due and payable, on the first day of July, 1872, being the third day of grace, payment was duly demanded, and the note duly protested for non-payment, and due notice of such demand and protest given to all parties; that after this the note was transferred to plaintiff.

The defendant by answer, denied that he indorsed the note sued on; and he further sets up as a defense, that the note, as originally made and when indorsed by him, was dated the 26th of June, 1870, and not the 28th of June, as stated in the petition, and that the date of the note had been altered without his knowledge or consent, and that being so altered and changed it is not the note he indorsed, and is a forgery, and he is not liable thereon as indorser.

The answer also denies, that the note as indorsed by him was duly presented for payment or protested, and denies notice of a proper demand and protest.

The foregoing is about the substance of the two defenses set up in defendant's answer. The plaintiff put in a replication denying all the material allegations of the answer.

The case was submitted to a jury, and upon the trial the plaintiff was permitted to read the note in evidence, and also the notary's demand and protest, and certificate that due notice thereof had been mailed to the defendant.

The certificate of the notary proved, that the demand and protest, &c., were made on the 1st day of July, 1872, and there was no evidence offered or given to the contrary.

On the issue as to the alteration of the date of the note from the 26th to the 28th of June, 1870, both parties gave evidence to establish their respective positions.

At the close of the evidence the plaintiff asked the following instruction, which was refused by the court, and he excepted: "The court instructs the jury, that no alteration of

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a note cannot affect the holder, unless it was made by his direction, knowledge or consent, and, before the jury can find for the defendant on the ground of the alteration of the date of the note, they must first find, that such alteration was made with the knowledge, consent or direction of F. Butz, the former holder, or of the plaintiff."

The court then of its own motion gave the following instruction, which was excepted to by the plaintiff: "The court instructs the jury, that if they find from the evidence, that the date of the note sued on has been changed from the 26th of June, 1870, to the 28th of the same month, and that said alteration of the date of said note was made after the defendant had assigned the note to F. Butz, they will find for the defendant, unless they find that said alteration was made by consent of defendant."

The court also gave the following instruction at the instance of the defendant, which was excepted to by the plaintiff: "If the jury find from the evidence, that the note sued on was due on the 26th day of June, 1872, then to hold the defendant by a protest, it was necessary that the same be protested within three days of said 26th day of June, 1872; and if they further find that it was not protested within the three days aforesaid, then the plaintiff cannot recover upon such protest."

The jury found a verdict for the defendant, and the plaintiff filed his motion for a new trial, which was overruled, and he excepted, and brings the case here by writ of error.

The defendant was an indorser of the note, and he can only be held liable as such when due demand was made at maturity of the note, and due notice given of such demand and refusal to pay. There is nothing in this case, as alleged in the petition or as offered in proof, to show that there was any waiver of due demand and notice; nor was any excuse alleged or given for not making the demand on the day the note matured, if it was actually dated the 26th of June, 1870. The plaintiff predicates his case on the presumption, that the note was, in fact, dated on the 28th and not on the 26th of June,

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1870, and that it matured on the first day of July, 1872, when demand and notice were given. He must stand or fall by the case as he has made it in his petition. He asks, however, by his instruction, to be allowed to recover on a note of the actual date of the 26th of June, 1870, if altered to the 28th, without his consent. Now, if the note bore date the 26th of June, his demand and protest were too late by two days to hold this indorser. If he was suing the maker instead of an indorser, his instruction might have been given, because the maker of a note is liable whether there be any demand of payment or not. His instruction is also erroneous on its face in using the word "cannot" instead of "can." This may have been a clerical error in copying it into the transcript; as it stands before us, it has no meaning. I, therefore, pronounce upon it as though it was correctly copied. Under the evidence and pleadings no error was committed in refusing this instruction.

The instructions of the court, on its own motion, and at the instance of the defendant, presented the case as it stood on the two issues fairly to the jury. There are some verbal inaccuracies in them, but not sufficient to mislead. Upon the whole case I think the verdict was for the right party.

Judgment affirmed. The other judges concur.

—o—

MARY ELFRANK by her next friend HERMAN ELFRANK, Plaintiff in Error, vs. DREKA SEILER, et al., Defendants in Error.

1. *Slander*—Words spoken in Dutch, set out in English, etc.—In slander, when the petition charges that the words alleged to be slanderous were spoken in the Dutch language, but only the English translation is set out, if defendant answers over, he cannot object at the trial to the introduction of evidence, on the ground that the petition does not state facts sufficient to constitute a cause of action.

Error to Bollinger Circuit Court.

Sutherlin and Wilson, for Plaintiff in Error.

- I. The petition is sufficient under the statute. (W. S., 519,

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§ 1; 1020, § 43; 1013, § 3; Stieber vs. Wensel, 19 Mo., 513; Dowd vs. Winters, 20 Mo., 361; Atwinger vs. Fellner, 46 Mo., 276; Bersch vs. Dittrick, 19 Mo., 129; W. S., 1034, § 5.)

II. A failure to set out the words in the Holland language, when words are set out in the English language that are actionable *per se*, is not a failure to state a cause of action.

III. Defendant should have demurred. Failure to demur was a waiver.

J. C. Noell and W. N. Nalle, for Defendants in Error.

I. Under our statute (2 W. S., 1020, § 43,) commented upon and construed in case of Stieber vs. Wensel, 19 Mo., 513, and Atwinger vs. Fellner, 46 Mo., 276, it is not necessary to set out the foreign words or aver that they were understood; but it is submitted that upon a strict and proper construction of that statute, the pleader having averred in his declaration that the words were spoken in the Holland language, must further aver that the words of slander given in English are a translation.

II. The proper mode of declaring, is to state the words in the foreign language and aver their signification in English, &c. (Heard, Libel and Slander, 238, § 210; 1 Stark., Slander, [1 Am. Ed.] 361, 411.)

SHERWOOD, Judge, delivered the opinion of the court.

Action of slander. The petition charged that defendant's wife spoke of and concerning the plaintiff, and her sister Anna, * * * the following false and slanderous words in the Holland language, and which language and the words spoken were understood by those who heard them, to-wit: Elfranks! *that mean people; whoring folks!*" The words in the Dutch language were not set forth.

The answer of the defendants was the general issue.

The trial came on, a jury was impaneled, and the plaintiff offered to introduce evidence in support of the allegations of the petition; but this was objected to by the defendants, on the ground that the petition did not state facts sufficient to constitute a cause of action, in that, the words alleged to have

been spoken in the Holland language were not set out in the petition in that language, etc., etc.

The court sustained the objection, plaintiffs excepted, took a non-suit with leave, etc., filed a motion to set aside the non-suit and this being overruled, again excepted and brought this cause here by writ of error.

(Our statute respecting practice in civil cases has worked a radical change in the rules of pleading which formerly prevailed when the common law had sway; and now, instead of being tested by Chitty, the "*sufficiency*" of the pleadings, except where otherwise specially provided, is to be measured by our Practice Act; and by reason of such change many trips and false steps which under the old *regime* would have proved fatal, are matters of no moment.)

There are only *two* things under our liberal system which are fatal to a suit, and those are, first, that the petition does not state facts sufficient to constitute a cause of action, and second, that the court has no jurisdiction over the subject matter of the suit. And the fatality as to the first instance cited, may be obviated so far as concerns a formal sufficiency by amendment; but if the pleader refuse to amend, defeat awaits him.

Aside from this fatal defect in the pleading, the pleader has nothing to fear. His petition however inartificially drawn, if it but state a cause of action, is, unless objections are made either by demurrer or by answer, as valid to all intents and purposes as though prepared by the most skillful hand. For unless objections are made in the manner stated, they are deemed to be waived. (2 W. S., 1015, § 10.)

It will be observed too, that the word "*objection*" as used in this connection, is so used in contra-distinction to the word "*defense*" as employed in section twelve on the page following; so that it is to be fairly inferred, that objections under the statute go only to the formal manner in which the substantial averments of the petition are arranged.

If the substantial averments are there and the adversary overlooks mere formal defects, his statutory right to indulge

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in critical objections is swallowed up in his statutory waiver.—Thenceforward he must address himself to the merits of the case.

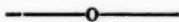
And this is precisely the situation of the defendants here.

If they had by demurrer questioned the formal sufficiency of the petition, in that it did not set forth *the words themselves* as spoken in the Dutch language, I am strongly inclined to the opinion, though not positively expressing it, that the objection would have been successful.

But it comes too late now to avail the defendants anything, after they have pleaded to the merits.

As the petition notwithstanding its lack of form, did state facts sufficient to constitute a cause of action; did charge the speaking of slanderous words actionable *per se*, the objections of the defendants to the introduction of evidence by plaintiff were ill-timed, and should have been overruled.

It follows that the judgment must be reversed and the cause remanded. The other Judges concur.



JESSE J. MCGREADY, Plaintiff in Error, *vs.* FRANK HARRIS,
Defendant in Error.

1. *Ejectment—Trustees' sales—Proceedings in bankruptcy—Adjudication—Equity.*—The mere fact, that proceedings in bankruptcy, which had not proceeded to an adjudication, had been commenced against the grantor in a deed of trust, will not invalidate a sale under said deed by the trustee; such sale would convey the legal title, and such title would be available in an action of ejectment.

QUERY, whether in a direct proceeding for that purpose, a court of equity would set aside such sale?

Error to Washington Circuit Court.

John L. Thomas & Bro., for Plaintiff in Error.

I. Even if the sale under the deed of trust after the filing of the petition in bankruptcy against the grantor, would not prevent the assignee subsequently appointed from redeeming

the premises, the purchaser at such sale acquired the legal title, and is, therefore, entitled to the possession, till the sale be set aside, and the proper party has been permitted to redeem. (*Sharman vs. Howell*, 49 Ga., 257; *Fehley vs. Barr*, 66 Penn., 196; *Bump Bankr.*, 179, 269, 174, 178, 266, 143; *In re*, Fuller 4 B. R., 29; *Bowman vs. Harding*, 56 Me., 559; *Kittredge vs. Warren*, 14 N. H., 509; *Clark vs. Binninger*, 30 How Pr., 363; *Jones vs. Lellyett* 39 Ga., 64; *In re*, Brinkman, 6 B. R., 541; *Marshall vs. Knox*, 8 B. R., 97.)

II. In involuntary proceedings in bankruptcy, it may become necessary for the United States Courts to exercise the power to issue writs of injunction to prevent waste. (*Bump Bankr.*, 268, 541.) But an injunction even in these cases will not go as a matter of course. (*Ibid*, 265, 268, 269; *Creditors vs. Cozzens*, 3 B. R., 73; *In re*, Metzler 1 Bt., 356.)

III. Strangers to the proceedings in bankruptcy not served with process, and who have not voluntarily appeared and become parties to such litigation, cannot be compelled to come into court under a petition for a rule to show cause. (*Bump Bankr.*, 272, 266.)

IV. The trustee having made sale of the property according to the forms of the deed of trust, at the request of the *cestui que trust*, he at least transferred the legal title to the purchaser, upon which ejectment may be maintained. (*Wallop vs. McKinney*, 10 Mo., 229; *Sutton vs. Mason*, 38 Mo. 120; *Pease vs. Pilot Knob Iron Co.*, 39 Mo., 124.)

M. Kinealy, and Reynolds & Relfe, for Defendant in Error.

I. The commencement of proceedings in bankruptcy, transfers to the District Court the jurisdiction over the bankrupt, his estate, and all parties and questions connected therewith; and operates as a *supersedeas* of all process in the hands of a sheriff of a State court, and as an injunction against all other proceedings than such as may thereupon be had under the authority of the District Court, until the question of bankruptcy shall be disposed of. (*Jones vs. Leach*, 1 B. R., 165; *Pennington vs. Lowenstein*, 1 B. R., 157; *In re*, Brink-

man, 7 B. R., 421; *Hutchings vs. Muzzy Iron Works*, 6 Chic. Leg. News, 27.) This jurisdiction exists until such case is closed. (Bankrupt Act, § 1; *Bump Bankr.* [5 Ed.], 173, 174; *In re*, *Hasbranch*, 1 Bt., 402.)

II. On equitable principles plaintiff ought not to be put in possession. (*Johnson vs. Houston*, 47 Mo., 227.) We ask the court to enter here a decree setting aside the sale by the trustee. (*Griffith vs. Judge*, 49 Mo. 536.) The trustee must adjourn the sale if necessary to prevent a sacrifice of the property; otherwise, the sale will be set aside. (*Graham vs. King*, 50 Mo., 22; *Bates vs. Perry*, 51 Mo., 449; *Quarles vs. Lacey*, 4 Munf., 251; *Rosett vs. Fisher*, 11 Grat., 492; *Hobson vs. Bell*, 2 Beav., 17; 2 Am. Law Reg., [N. S.] 712, which contains an exhaustive review of the question.) It is the duty of the trustee to refuse to sell while clouds are hanging over, or disputes concerning the title exist, which would prevent a sale at the full or fair price value of the property. (2 Am. Law Reg., [N. S.] 732, and cases cited; *Longwith vs. Butler*, 8 Ill., 32.)

III. This equitable defense set up by defendant, under our practice can be pleaded and determined in ejectment. (*Wynn vs. Corey*, 43 Mo., 301.)

NAPTON, Judge, delivered the opinion of the court.

This was an action of ejectment. The plaintiff was the purchaser of the lands sued for, at a sale made in August, 1872, by the trustee under a deed of trust made in 1868. In April 1872 (Apr. 8th) proceedings in bankruptcy had been instituted in the District Court of the United States against the debtor and grantor in the deed of trust, but the trustee, although apprised of such proceedings by the grantor on the day of the sale, proceeded with the sale, and the plaintiff became the purchaser, and the only question is, whether the institution of the proceedings in the U. S. District Court rendered the sale void.

There was no order from the District Court restraining, or otherwise interfering with, the sale, nor had the proceedings therein terminated in any adjudication whatever. It was an

attempt on the part of defendant's creditors to have him declared a bankrupt.

The Circuit Court, before which this case was tried, declared the sale null, and that the plaintiff had no title.

We do not so understand the decisions of the Federal Courts interpreting the Bankrupt Act. That law was not designed to invalidate or destroy *bona fide* liens on the estate of the bankrupt, nor does it reserve exclusively to the District Court the power to have them enforced in all cases, and under all circumstances.

They may be enforced in [the] mode provided for by the contract of the parties, or by the action of State courts or State officers.

Doubtless the District Court might have intervened in this case, but it did not, and therefore we cannot see that the mere fact of a proceeding being instituted would destroy the legal title of plaintiff as he received it from the trustee.

So far as the rights of an assignee in bankruptcy are concerned, it may well be that the whole transaction could be, on presentation to the court, examined and declared fraudulent or void, if the facts warranted.

But no assignee has been appointed in this case, nor so far as the record shows has there been any adjudication whatever in the proceedings in the District Court.

Should such adjudication occur, and an assignee be appointed, we are unable to perceive why the assignee cannot deal with the purchaser as well as the mortgagor, if he seeks to question the validity of the deed or of the sale thereunder.

With these questions however we have no concern. In this action of ejectment the simple question is, who has the legal title, the purchaser at the sale or the defendant? The deed gave the trustee a power to sell and convey the legal title.

Whether this sale was made under such circumstances as to authorize a Court of Equity to set it aside in a direct proceeding for that purpose, is another question, which is not presented by this case. The court below simply declared the sale a nullity. It may be, that the land was sacrificed, and

that the trustee should have deferred the sale under the circumstances, but the court below did not pass on that point and it is not therefore before this court.

The judgment is reversed and the cause remanded. The other judges concur.



STATE OF MISSOURI, Defendant in Error, *vs.* J. F. HARNEY,
Plaintiff in Error.

1. Judgment affirmed.

Error to Warren Circuit Court.

P. P. Stewart, for Plaintiff in Error.

C. E. Peers, for Defendant in Error.

ADAMS, Judge, delivered the opinion of the court.

This was an indictment for grand larceny. The larceny charged was stealing a mule. The defendant was convicted, and sentenced to the penitentiary for the term of three years.

The evidence tended to show, that the mule had been stolen in St Louis County, and taken by the defendant to Warren County; and from Warren to Lincoln County; that he was followed to Lincoln and brought back to Warren County without legal arrest, and then legally arrested in Warren County.

The only material point raised and discussed is, that the defendant could not be indicted and punished in Warren County. This question is settled by section 19 (2 W. S., 1089), which provides, that "when property stolen in one County, and brought to another, shall have been taken by larceny, burglary or robbery, the offender may be indicted, tried and convicted for such larceny, burglary or robbery in the County into which such stolen property was brought, in the same manner as if such larceny, burglary or robbery had been committed in that County."

Let the judgment be affirmed. The other judges concur.

THE STATE OF MISSOURI Respondent, *vs.* PHILIP BULLINGER,
Appellant.

1. *Practice, criminal—Incest—Indictment, allegations of.*—In an indictment for incest with his daughter, it is not necessary to allege, that the defendant had carnal knowledge of the prosecutrix, knowing her to be his daughter.
2. *Practice, criminal—Trials—Incest—Relationship, how proved.*—In trials for incest the relationship of the parties may be proved by reputation.

Appeal from St. Louis Criminal Court.

Stewart & Wieting, for Appellant.

I. The indictment does not charge a crime against defendant in that it does not state, that he had carnal knowledge of the prosecutrix, knowing her to be his daughter. (*Williams vs. State*, 2 Ind., 439.)

II. The fact that defendant had called the prosecutrix daughter, and she had called him father, which is all the evidence offered on this subject, is not sufficient evidence of the relationship. (*Morgan vs. State*, 11 Ala., 289.) She may be the daughter of defendant's wife by a former husband, she may have been adopted by him in her infancy, or she may be the wife of defendant's son.

III. Such a grave case should be so proven as to leave no room for a rational doubt. (*Clark vs. State*, 37 Ga., 191.)

IV. The testimony to prove that Mrs. Schoekel is the author of this prosecution was competent to contradict the prosecutrix, who testified that Mrs. S. had nothing to do with the prosecution, and to show that a conspiracy existed between the prosecutrix and Mrs. Schoekel, to ruin the defendant, and in this way, also effect the credit to be given to the testimony of the prosecutrix.

J. C. Normile, for Respondent.

I. The evidence of what Mrs. Schoekel said or did, she being a stranger to the record, was properly ruled out. The declaration of a third party, not examined as a witness, made out of court, is mere hearsay and not evidence of the fact stated in such declaration. (*Salmon vs. Orser*, 5 Duer, 511; *Bailey vs. Wood*, 24 Geo., 164; *Ibbitson vs. Brown*, 5 Iowa,

532: Person's Adm'rs vs. Burdick, 6 Wis., 63; Baker vs. Coleman, 35 Ala., 221; Alexander vs. Mahon, 11 Johns., 185; Woodward vs. Payne, 15 Johns., 493.)

II. The relation of father and daughter is scarcely probable other than that he has admitted her to be his daughter and treated her as such from childhood, and this is the only proof necessary. (Bish. Stat. Crimes, § 736; Ewell vs. State, 6 Yerg., 364; People vs. Jenners, 5 Mich., 305.)

WAGNER, Judge, delivered the opinion of the court.

This was an indictment and conviction under the statute (W. S., 499, § 6), for the crime of incest.

The first objection made as to the sufficiency of the indictment, that it does not charge that defendant had carnal knowledge of the prosecutrix, knowing her to be his daughter, is not tenable.

The only case cited in support of the objection, is Williams vs. State (2 Ind., 439), and that case was decided under a statute materially different from ours. The words of the Indiana Statute were, "If any father shall have sexual intercourse with his daughter, knowing her to be such," and the indictment alleged, that the defendant unlawfully did have sexual intercourse with his daughter; this was held to be insufficient, as not containing any averment of his knowledge of the relationship, the word "unlawfully" not being considered an equivalent for the words of the statute. But where such express statutory language does not exist, and the matter rests merely upon the ordinary rules of pleading, there is no necessity for the indictment to allege a knowledge of the relationship on the part of the defendant. (2 Bish. Crim. Proc., § 31; Baker vs. State, 30 Ala., 521; Bergen vs. The People, 17 Ill., 426; Hicks vs. The People, 10 Mich., 395.)

The indictment in this case charges the defendant with unlawfully, incestuously, knowingly, feloniously and willfully committing the crime, and that is abundantly good under the statute.

After the State had closed its evidence, the defendant asked the court to give one instruction, that there was no evidence

from which the jury could find that the defendant and the prosecutrix were within the degrees of consanguinity so as to make the offense incest. This instruction was, we think, properly refused. The evidence showed, that defendant recognized and held out the prosecutrix as his daughter; that he clothed her and called her such, and that she called him "father;" that those, who were intimate with the family, always regarded her as his daughter, and that another daughter, who was a witness, swore that she was her sister. This was certainly *prima facie* evidence, sufficient to carry the case to the jury. Whatever different views may have been formerly entertained, the better doctrine now is, that on an indictment for incest, the relationship and pedigree of the parties may be proved by reputation. (Bish. St. Cr., § 735; Ewell vs. State, 6 Yerg., 364.)

The defendant offered to prove, that a third person, a Mrs. Schoekel, was the author of the prosecution, and that she had stated this fact, declaring that she intended to ruin the defendant, and that she had persuaded the prosecutrix to make the affidavit against her father.

I do not see upon what grounds the testimony was admissible. Mrs. Schoekel was not a witness in the case; she had not testified, and any impeachment of her motives would have been wholly foreign to the case.

The evidence of the prosecuting witness clearly and positively proved the crime charged in the indictment, and the credibility of the witness was for the jury. The instructions stated the law fairly and justly, and are amply supported by the best authorities on the subject. Under these circumstances, it is not the province of this court to interfere.

Judgment affirmed. The other judges concur.

Mikel v. St. Louis, Kansas City and Northern R. R. Co.

WHITAKER MIKEL, Appellant, *vs.* THE ST. LOUIS, KANSAS CITY
AND NORTHERN RAILWAY Co., Respondent.

1. *Corporations—Suits against, where to be brought—Construction of statute.*—Suits against corporations, can be brought, as provided by the statute (W. S., 294, § 28), either in the county where the cause of action accrued, or in the county where such corporation have or usually keep an office or agent for the transaction of their usual and customary business, at the option of the plaintiff. Section 26 (W. S., 294,) provides for an enlargement and extension of service, by issuing process to a different county from where the suit is brought, when the officers of the company do not reside there.

Appeal from Adair Circuit Court.

Barrow & Millan, for Appellant.

I. The corporation act is designedly liberal in its terms, and under it the plaintiff has his option as to where he will have his suit against a corporation. (W. S., 294, §§ 26, 28; *Dixon vs. Han. & St. Jo. R. R.*, 31 Mo., 409; *Han. & St. Jo. R. R. vs. Mahoney*, 42 Mo., 467; *Slavens vs. South P. R. R.*, 51 Mo., 308; *Brown vs. Webber*, 9 Cush., 560.)

John M. Woodson, for Respondent.

I. Construing sections 26 and 28 (W. S., 294) together, we consider the meaning thereof to be, that suit must be brought against a corporation in the county where the cause of action accrued, unless it has no office or agent there, and in that case where it has an office or agent. The obvious intention is to have suits determined, where the cause of action accrues, if possible, in order to avoid unnecessary expense to litigants.

WAGNER, Judge, delivered the opinion of the court.

The only question in the case relates to the jurisdiction of the court where it was tried.

The plaintiff brought his action in the Adair Circuit Court to recover damages for the killing of a mule by the defendant's cars in Macon County.

The court, trying the cause without the intervention of a jury, made a special finding of facts, and gave judgment against the plaintiff solely on the ground that the action should have been brought in Macon County, where the killing occurred,

and that the court in Adair County had no jurisdiction of this cause of action. It was further found, and is admitted, that defendant has in Adair County an office or agent for the transaction of its usual and customary business.

The statute (1 W. S., 294, § 28,) declares that suits against corporations shall be commenced, either in the county where the cause of action accrued, or in the county where such corporations have or usually keep an office or agent for the transaction of their usual and customary business. The section is in the alternative, and it seems to me that its provisions are plain and not easily susceptible of misconstruction. Suits may be brought either in the one county or the other, at the option of the plaintiff.

They may always be brought in the county where the cause of action accrued, or if it is not desirable to bring them there, then in the county where the company has or usually keeps an office or agent for the transaction of its business. The statute is remedial in its nature, and should not receive a restricted or artificial construction. But its language is so plain, that there is really no reason for resorting to technical rules to interpret or ascertain its true meaning.

The 26th section, which has been cited in connection with the section just referred to, has no application to this case. This section provides for an enlargement and extension of service, by issuing process to a different county from where the suit is brought, when the officers of the company do not reside there. This section illustrates the subject only by showing the remedial character of the statute, but it does not aid in the least the views advanced by the defendant.

Wherefore it results that the judgment must be reversed and the cause remanded, with instructions to the court below to render judgment, on the finding of facts. All the judges concur.

PETER COMPTON, *et al.*, Plaintiffs in Error, *vs.* JAMES R. ARNOLD, Defendant in Error.

1. *Practice, civil—Trials—Bonds, loss of—Parol testimony.*—When a bond is given in a cause and is afterwards lost, its contents may be proved in that cause by parol testimony.

Error to Washington Circuit Court.

G. I. Van Alen, for Plaintiffs in Error.

I. The action of the court was clearly erroneous; the statute provides the manner in which lost papers and records may be supplied. (W. S., 1137.)

II. There was no bond on file and the introduction of evidence on the 13th, to sustain the judgment entry of the 6th of February, was contrary to law, and without any law to sustain it.

Detchemendy & Arnold, for Defendant in Error.

I. The judgment was properly rendered against the sureties. (W. S., 1026, §§ 11, 12; *Strain vs. Murphy*, 49 Mo. 337.)

II. The sureties were both before the court resisting the bond being supplied, and it was not necessary that a writ should issue before the court could acquire jurisdiction of them.

WAGNER, Judge, delivered the opinion of the court.

The only error complained of, is the action of the court in entering up judgment against the sureties on plaintiff's bond. It seems that the plaintiff commenced an action before a justice of the peace to recover possession of a horse, and the case was finally appealed to the Circuit Court, where judgment was rendered for the defendant. In the latter court it was shown, that the bond given by the plaintiff was lost, and testimony was admitted by the court as to the character of the bond, and who were the sureties.

Upon this evidence the court gave judgment against the sureties. The sureties appeared, and objected to the admission of any evidence concerning the bond, and insisted that the same could not be proved or supplied in that way; but the court decided otherwise.

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The sureties were before the court. They appeared and contested the very facts on which judgment was pronounced. If the bond was lost or destroyed, there was no valid reason against hearing secondary evidence of its contents. The evidence seems to have been sufficient to satisfy the court, and with its decision on the facts we will not interfere. The statute in relation to supplying lost records, which has been relied on, does not apply to this case.

Let the judgment be affirmed. The other judges concur.

—o—

ROBERT BERRY, Respondent, *vs.* PHILO L. SMITH, Appellant.

1. *Practice, civil—Exceptions—Reversal.*—Where no exceptions are taken to the rulings of the lower court, this court will not reverse the case on the ground of such rulings.

Appeal from Cape Girardeau Court of Common Pleas.

Louis Houck, for Appellant.

J. McWilliams, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The only complaint made is, in regard to the action of the court in refusing to grant a change of venue on the application of the defendant.

When the court overruled the application, the record states, that the defendant presented his bill of exceptions; but it does not appear that he did except to the ruling. So, when the motion for a new trial was overruled, no exceptions were taken to the decision at all; there is, therefore, nothing saved for this court to consider.

Judgment affirmed. The other judges concur, except Sherwood J., absent.

PETER COMPTON, Plaintiff in Error, vs. JAMES R. ARNOLD,
Defendant in Error.

1. *Practice—Trials—Jury, separation of—New trials.*—The separation of the jury, even in criminal trials, is no ground for a new trial, when there is no ground to suspect that the jury has been tampered with.

Error to Washington Circuit Court.

G. I. Van Alen, for Plaintiff in Error.

I. It was error for the court to go into the jury room, and converse with the jurors about the case, in the absence of, and without the consent of, plaintiff. (*Moody vs. Pomeroy*, 4 Denio, 115, and cases cited.)

II. It was error to allow the jury, after they had been charged and sent out to their room, to separate and mix with the people and witnesses, and hear the case discussed out of court. (5 Cow., 283.)

Detchemendy & Arnold, for Defendant in Error.

I. The action of the judge, or the conduct of the jurymen, constitutes no ground for reversing this judgment.

VORIES, Judge, delivered the opinion of the court.

This action was brought before a Justice of the Peace to recover a mare, alleged to be of the value of seventy-five dollars, with damages for her unlawful detention.

The plaintiff recovered a judgment before the justice, from which the defendant appealed to the Washington Circuit Court. In the Circuit Court judgment was rendered in favor of the defendant, and the plaintiff has brought the case here by writ of error.

The only error insisted on in this court, as a ground for reversing the judgment of the Circuit Court, is the refusal of the Circuit Court to grant the plaintiff a new trial, upon his motion for that purpose. The ground relied on, in the plaintiff's motion for a new trial, was the misconduct of the judge who tried the cause, and of the jury while they were considering their verdict, after the case had been closed and submitted to them. It appears by the affidavits filed with the mo-

tion for a new trial, that the trial was closed and the case finally submitted to the jury about five o'clock in the evening, that, when the jury retired under the charge of an officer, the court took a recess until seven o'clock, when the court room was vacated; after this the jury for some reason occupied the court room. The judge of the court returned at seven o'clock, at which time neither of the parties were present. The judge opened the door of the court room, and finding the jury in the room, he spoke with some members of the jury, and finding that they had not agreed, he told the foreman of the jury, in presence of the officer who had them in charge, that if they agreed by ten o'clock, that they could seal up their verdict and return it into court in the morning; but if they failed to agree by ten o'clock, they might then retire to their respective rooms for the night, and he then directed the deputy sheriff to adjourn court until nine o'clock in the morning. It is farther shown by the affidavits, that the jury remained together up to ten o'clock at night, at which time they separated and went to their respective lodgings, where they remained until morning, when they assembled and made up a verdict and returned it into court. It is also shown, that one of the jurors, after the jury separated, called at a saloon, and remained there a short time, and that there were two persons in the saloon discussing the evidence in the case on trial, in hearing of the juror or where he might have heard it.

This constitutes the whole misconduct, either on the part of the court or jury, complained of. We see nothing to complain of in the conduct of the judge. After taking a recess, evidently to see if the jury could not agree before a final adjournment, he returns to the court room, and finds that the jury had been placed in the court room by the officer having them in charge. In place of driving the jury out of the room, and resuming his seat on the bench, and then having the jury formally called into court to inquire if they had agreed, he dispenses with this formality, directs the sheriff to adjourn court until the next morning, and directs the foreman of the

jury, that if there was no agreement by ten o'clock at night, the jury could be permitted to retire to their respective homes or lodgings until morning. This was, to say the most of it, only an informality; there is not even a pretense in the affidavit, that the judge had a word of conversation with the jury about the cause on trial, and there is no doubt that if the court had been formally in session, it had the right in its discretion, to permit the jury to separate, even without the consent of the parties. (Grah. and Wat., New Trials, 81 *et seq.*)

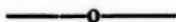
In reference to the misconduct of the juror it is only shown, that, after the jury separated at ten o'clock, he called at a saloon; it is not shown how long he remained, but it is shown, that while in the saloon, two persons there were discussing the evidence in the case on trial, and that it was in the hearing of the juror. It is not even shown that the persons discussing the evidence in the case directed their conversation to the juror, or that they even knew that the juror was in the room, nor is it shown that the juror paid any attention to the conversation, or that he remained there for any length of time. In such case we will not presume that there was any attempt to bias the mind of the juror. Neither of the parties was present, and there is nothing to show that anything improper was introduced, nor were there any circumstances in the case to lead to, or create, any suspicion that anything improper was intended. It has been often held by this court, even in criminal cases, that the separation of a jury was no ground for a new trial, where there were no grounds to suspect that the jury had been tampered with. (State vs. Harlow, 21, Mo., 446; State vs. Brannon, 45 Mo., 329; State vs. Matrassey, 47 Mo., 295; and see also Grah. and Wat., New Trials, *supra*.)

It is very desirable, that the forms of the law should be adhered to in the trial courts, and that courts and juries should conform to the strictest rules of propriety, so as to obtain the highest respect for their decisions; but cases cannot be reversed for mere technical informalities; if so, it would place it in the power of designing parties to lay the foundation for

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new trials in almost every jury trial. This judgment must be affirmed.

The other judges concurring, the judgment is affirmed.



DANIEL CHRISMER, Respondent, vs. THE ST. LOUIS, KANSAS CITY AND NORTHERN RAILWAY COMPANY, Appellant.

1. *Practice, civil—Appeal from Justice—Entry of appearance—Trial.*—In a cause appealed from a justice of the peace, the appellee, who has failed to enter his appearance, cannot be forced to trial at the first term of the court.

Appeal from Warren Circuit Court.

John M. Woodson, for Appellant.

I. The appellant could not be forced to trial at the first term, because the appeal is not taken on the day of the judgment, no notice was served on the appellee, and it did not enter its appearance (W. S., 850, §§ 21, 22; *McCabe vs. Lecompte*, 15 Mo., 78; *Rowley vs. Hinds*, 50 Mo., 403; *Purcell vs. Han & St. Jo. R. R.*, 50 Mo., 504; *May vs. Han & St. Jo. R. R.*, 51 Mo., 575.)

[The other points urged in the brief are necessarily omitted, because the court did not pass upon them.]

E. A. Lewis, and Dryden and Carkener, for Respondent.

I. The motion for a continuance was rightfully overruled. The provisions of the statute (W. S., 850, § 22) are for the benefit of the appellee; the appellant is always in court. (47 Mo., 498.)

II. Defendant is estopped from claiming a continuance. It subpoenaed witnesses and otherwise prepared for a trial, whereby appellee was let to understand that defendant intended to try the case, and prepared accordingly.

[The other points of the briefs are necessarily omitted, the court not having considered them.]

NAPTON, Judge, delivered the opinion of the court.

The judgment must be reversed for the reason, that a trial was forced on defendant at the first term, although the appellee had not entered an appearance within the first two days of that term. The other points in the case have been considered and determined in other cases decided at this term.

Judgment reversed and cause remanded.

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THE STATE OF MISSOURI, Respondent *vs.* ANTON HOLME, Appellant.

1. *Practice, criminal—Trials—Calling the jury.*—The provision in the statute (W. S., 800, § 25,) that the clerk of the court in a criminal case shall call the jury to be impaneled, is directory.
2. *Practice, criminal—Errors—Reversal.*—No error, that is not a violation of some positive rule of law, or which may not possibly prejudice the defendant, can be a ground for reversal on appeal.
3. *Practice, criminal—Trials—Errors—Impaneling the jury.*—In a criminal case the failure to call the first twelve names on the list for the jury, after the challenges are exhausted, is a violation of the statute, (W. S., 800, § 25,) and, the defendant having objected at the time to the course pursued, is a substantial error, and the case must be reversed.
4. *Practice, criminal—Instructions—Reversal.*—A cause will not be reversed, although unobjectionable instructions were refused, if those given completely covered the case.
5. *Practice, criminal—Murder—Malice—Presumption—Statute, construction of.*—Unless the circumstances from which the jury may presume malice, are proved, the law will presume under the statute (W. S., 445 § 1,) that the unlawful killing was murder in the second degree.
6. *Practice, criminal—Murder in the first degree.*—If the party killing, had time to think, and did intend to kill, for a minute, as well as for an hour or a day, it is a deliberate, willful and premeditated killing, constituting the crime of murder in the first degree.
7. *Practice, criminal—Murder in the first degree—Malice, presumption of—Justification or palliation.*—As a general rule of law, every homicide is deemed malicious, unless it is shown that it was justified, excused or palliated; the proof of justification, excuse or palliation resting upon the accused, when the homicide is proven, unless evolved in the testimony produced by the accusing party.

8. *Practice, criminal—Defense of insanity—Question of fact.*—The defense of insanity in a criminal case is a question of fact for the decision of the jury. (State vs. Hundley, 44 Mo., 414.)
9. *Practice, criminal—Adultery—Killing wife or paramour—Mitigation.*—In order to mitigate to manslaughter, the crime of killing the wife or her paramour by the husband, the husband must discover them in the act of adultery, unless the provocation was so recent and strong that he could not be considered at the time master of his own understanding.
10. *Practice, criminal—Unlawful killing—When reduced to manslaughter.*—In order to reduce the crime of unlawful killing of a person to manslaughter, the reason of the accused must at the time of the act be disturbed or obscured by passion to an extent, which might render a reasonable person liable to act rashly, without deliberation, and from passion rather than judgment, and generally, the provocation must occur in the presence of the injured party, for then the law presumes that he acts upon sudden impulse.

Appeal from St. Louis Criminal Court.

Michael B. Jonas, for Apellant.

I. The jury should have been selected by the clerk of the court from the first twelve names remaining on the list unchallenged. (W. S., 800, § 25; State vs. Hays, 23 Mo., 287.)

II. The court erred in defining "deliberately and premeditatedly" in the first instruction given. (Comm. vs. Drum, 58 Penn. St., 9; 9 Whar. Homicide, [Ed. 1855] 368-372; Bouv. Law Dic. "Deliberation and Premeditation;" 2 Whar. Am. Crim. Law, 133; Dale vs. State, 10 Yerg., [Tenn.] 551; Anthony vs. State, 1 Meigs, [Tenn.] 265.)

III. Express malice or malice in fact is requisite to be proved. (Bower vs. State, 5 Mo., 364, dissenting opinion; State vs. Phillips, 24 Mo., 475; State vs. Starr, 38 Mo., 270; Comm. vs. Drum., 58 Penn. St., 9; Comm. vs. O'Hara, 2 Va. Cases, 86; Whiteford vs. Comm., 6 Rand., 721; Wilson vs. People, 52 N. Y., reported in Am. Law Rev. for Oct. 1873, p. 42; Mitchell vs. State, 5 Yerg., 352; Short vs. State, 7 Yerg., 510; Coffee vs. State, 3 Yerg., 233; Witt vs. State, 5 Cold., 5; Comm. vs. York, dissenting opinion of Judge Wilde, 9 Met., 125; Maher vs. People, 10 Mich., 218; Shoemaker vs. State, 12 Ohio, 53; State vs. Turner, Wright, 28; Lisbon vs. Lyman, 49 N. H., 553.)

IV. It is not necessary to reduce the offense to man-

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slaughter that the wife shall be found in the act of adultery. (Maher vs. People, 10 Mich., 212.)

V. It is a true test of manslaughter, that the homicide be committed in a sudden transport of passion, arising upon a reasonable provocation and without malice. The authorities use the terms "adequate, sufficient and reasonable," when applied to the provocation, as equivalent. (1 East R. C., 232; 1 Whar. Cr. Law, § 987; 2 Bish. Cr. Law, § 630 and n.; Young vs. State, 11 Humph., 200, and authorities cited.)

VI. A reasonable provocation is one for which a good reason can be given, and which might naturally and rationally, according to the laws of the human mind, produce the alleged sudden transport of passion.

J. C. Normile, for Respondent.

I. The law (W. S., 800, § 25,) directing the impaneling of juries, was substantially complied with. Such laws are merely directory. (Sedg. Stat. and Const. Law, 368; 1 Grah. & Wat. New Trial, 537; Birchard vs. Booth, 4 Wis., 67; Clarke vs. Comm., 29 Penn. St., 129; Bristow vs. Comm., 15 Gratt., 634; State vs. Gut 13 Minn., 341.)

II. Mistakes or omissions of officers in impaneling juries when no fraud or collusion is intended, and no injury results to the defendant, is no ground for a new trial. (1 Grah. & Wat. New Trials, 35-6, 40; Steele vs. Malony, 1 Minn., 347; Thrall vs. Smiley, 9 Cal., 529.)

III. "In matters of form in impaneling a jury, the courts both in Great Britain and this country, have refused to interfere when points merely technical and unproductive of any injury have been presented; and have by a series of decisions placed all applications of this kind within the principle of judicial discretion." (1 Grah. & Wat., 37; Forsythe vs. State, 6 Ohio, 19.)

IV. It is no ground for reversal to refuse giving an instruction which has already been given in another form. (Maston vs. Fanning, 9 Mo., 305; Webb vs. Browning, 14 Mo., 354; Huntsman vs. Rutherford, 13 Mo., 465; Darby vs. Charles, 13

Mo., 600; Pond vs. Wyman, 15 Mo., 175; State vs. Floyd, 15 Mo., 349; Phillips vs. Smoot, 15 Mo., 598; State vs. Smith, 31 Mo., 566; Beale vs. Cullum, 31 Mo., 258.)

WAGNER, Judge, delivered the opinion of the court.

The counsel for the appellant in this case have urged and insisted that the court below committed many errors in its rulings; but after a careful scrutiny of the record, we find the objections are nearly all so technical and unsubstantial in character, that they require no consideration at our hands. Such as seem to have any merit we will proceed to notice.

It appears, that after the requisite number of jurors had been called and examined, and the prosecution and defense had both exercised their right of challenge, there still remained fifteen qualified jurors competent to try the cause. The court then directed the marshal to call a jury of those who were unchallenged. And he proceeded to call the same, but omitted to call the names of M'Cutcheon and Stratman, who were among the first twelve of the fifteen, and as the jurors were so called, their names were recorded by the clerk.

The prisoner, by his counsel, objected to the marshal calling the jurors, and also objected to the panel as then constituted. Both objections were overruled.

The statute in reference to the impaneling of juries provides, that the sheriff or other officer, summoning a jury, shall deliver to the clerk a list of the names of all jurors summoned, who shall strike from such list the names of all persons excused by the court, or challenged for cause, or peremptorily challenged by the parties; and he shall record in his minute book the first twelve names remaining on the list; and the jurors, whose names are thus recorded, shall be the jury to try the cause for which they are selected. (W. S., 800, § 25.)

The objection, that the marshal instead of the clerk, called the names of the jurors, is unavailing. The calling is a matter of mere form. And although the statute designates the clerk as the proper person, that part may safely be regarded as directory. So that the persons, whom the law

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points out as the jurors, are selected and impaneled, it is immaterial who records and calls their names.

But the objection, that two of the persons, whose names were among the first twelve on the list, were omitted to be called, and thereby excluded from the jury, presents a more grave and serious question. The law is peremptory, that the first twelve names remaining on the list shall be recorded, and that the names thus recorded shall be the jury to try the cause for which they are selected.

The first twelve constitute the properly selected jurors, and neither party can be deprived of this legal selection without his consent.

In looking over the list of names of those summoned and returned by the officer, the party relying upon the statutory provision, that the first twelve names remaining shall be the jury selected to try the cause, may be entirely satisfied with them, and therefore decline to exercise his privilege of making peremptory challenges.

But if the court may disregard this provision, and arbitrarily refuse to have the first twelve called, and call others in their stead, then surely he has not obtained the jury that he selected.

If the court may refuse to have two called among the first twelve, it may refuse a half a dozen, and if it is not bound to take the first twelve, it may take the last twelve. Such a practice would not only set at defiance the plain mandates of the statute, but it would lead to a confusion and uncertainty utterly destructive of the right of parties.

It is however contended, that, admitting that the statute was not followed, it does not appear that the prisoner was injured by the action of the court, and therefore, it should be disregarded.

In 1 *Graham and Waterman on New Trials*, p. 38, it is laid down, that in mere matters of form in impaneling a jury, the courts, both in Great Britain and this country, have refused to interfere, where points merely technical and unproductive of any injury have been presented; and have by a series of deci-

sions placed all applications of this kind within the principle of judicial discretion.

A few cases will be adverted to in illustration of the principle, where the courts refused to interfere on the ground that the party was not injured.

Thus, in the *State vs. Hays*, (23 Mo., 287,) when the cause was taken up for trial, the defendant moved the court to compel the State by her Circuit attorney to make her peremptory challenges to the panel before the defendant should be compelled to make his peremptory challenges, which the court refused to do, and compelled the defendant to strike from the panel his peremptory challenges, without knowing which of the panel the State would strike off upon her peremptory challenges, making both parties challenge at the same time.

To this ruling the defendant excepted. On appeal to this court, Mr. Justice Ryland, in delivering the opinion, said, "The record does not show us how this was done. There might have been thirty-six jurors present, free from all objection. Then the State having four peremptory challenges, and the defendant twenty, the remaining twelve would be the jury. If so, the defendant has not been deprived of any advantage or legal right. He has challenged his twenty, but he says he may have challenged some of those who had been challenged by the State, and had he known whom the State would have challenged, it would have given him the power to have challenged others. All this may be so, and still he has lost no right or privilege. He had the thirty-six men from whom the jury were to be selected. The State could refuse four, and he twenty. No one of the jurors was put on his panel against his right, nor in violation of his right. Suppose the State's four and his twenty were confined, as it is possible they might be, to the same twenty men, leaving sixteen behind, why then the State has just as much right to complain of having lost her four challenges, because she did not know those whom he would challenge, as he has. The first twelve then called will make the jury. And the fact,

that there are sixteen out of which to make a jury instead of twelve, can surely be no deprivation of any right or privilege."

It will be perceived, that the case thus cited, differs widely from the one at bar.

There the prisoner made his challenges, and the first twelve remaining on the panel were duly called and sworn, as the jury selected to try the cause. But it is clearly announced in the decision, that the first twelve remaining on the list would be the jury, and so Mr. Justice Story on the Circuit, in deciding upon this subject, held, that after the challenges were exhausted the first twelve remaining would make up the jury. (*U. S. vs. Marchant*, 4 *Mason*, 158.)

I readily concede, that for a mere informality or mistake in impaneling a jury, where no injury ensues, a verdict will not be set aside, nor a new trial granted.

In the case of *The King vs. Hunt*, (4 *Barn. & Ald.*, 430) where a special jury was ordered and only ten jurymen appeared, two of those named in the panel not having been summoned, and two talesmen were sworn on the jury. On motion for a new trial it was contended, that it was indispensable that the whole panel should be summoned; that the statute was imperative, and that if two could be omitted, so might any other number, and there would be a selection of particular persons to try the cause. But in overruling this motion, the court, by Abbott, Ch. J., said:

"No case has been cited, which is a direct authority on this question, so as to form a ground for our decision. We must, therefore, look to the principle on which this application is founded. There has been, in this case, an omission to summon two of the special jury. * * * It is not suggested in this case, that the omission has been in consequence of any collusion with any other person. If then, on these affidavits, we were to grant a rule, we should intimate it to be our opinion, that in every case which may be tried, whether civil or criminal, if the party, against whom the verdict passes, chooses to apply, he will be entitled as of right to a new trial, in case he shows to the court, that any one jurymen has not been

duly summoned to attend. This would be going a great deal too far. I think, therefore, that we ought not to grant this rule."

So, in *Cole vs. Perry*, (6 Cow., 584,) which may be considered a case of gross carelessness, but, no abuse or injury appearing to the party, a new trial was refused. It was moved, that the verdict be set aside on the ground of irregularity in drawing the petit jurors. The names of the jurors summoned and impaneled at the Circuit, were written on several and distinct pieces of paper, being all as near as might be of equal size, and put into boxes open at the top by an orifice of about five inches in diameter, from which they were drawn to compose the several juries; they were not rolled or folded together, and the names of the jurors were easily and distinctly visible to the person drawing. But the court say: "The statute relied upon is merely directory to the officer drawing the ballots. We have often holden this in relation to statutes of a similar character. No abuse or injury to the defendant being pretended, and no objection made at the time, the mistake of the officer is not a ground for setting aside the proceedings."

The above cases, and the principle they announce, are all distinguished and separated by a clear line of demarcation from the one we are now considering.

These were cases where irregularities merely, were committed, which could not possibly redound to the injury of the party, or where the party had not made his objections at the appropriate time.

No error, that is not a violation of some positive rule of law, or which may not possibly prejudice the defendant, can be a ground for reversal on appeal; but it is with great hesitancy, that the courts will say in a criminal case that an error does not prejudice the defendant. In the present case a positive rule of law is violated, and the statute, which declares that certain persons shall be selected to try the cause, is set at naught, and other persons substituted in their place. And this is done against the objections of the defendant made at the time. In this action we think the court committed a substantial error.

We will now pass to a brief review of the instructions. There was no error in the court's refusing the first and sixth instructions offered by the defendant. There was no sufficient evidence to justify these instructions, and the first one asserted an incorrect proposition of law. Moreover the instructions given by the court completely covered the whole case, and, if they were correct, we will not reverse because the defendant asked for other instructions which were unobjectionable.

The defendant was indicted for murder in the first degree in killing his wife, Ida Holme, and our statute, which defines the crime, declares, that every murder, which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed murder in the first degree. (W. S., 445, § 1.) This statute has modified the common law rule as to the inference of malice and intent. From the simple act of killing the law will presume, that it was murder in the second degree only. To raise it to a higher grade of murder in the first degree, there must be some circumstances shown, from which the jury can find that it was done with willfulness and premeditation.

Our statute is a literal transcript of an old statute in Pennsylvania, and we have invariably followed the construction put upon it by the courts in that State. The language of this court has uniformly been, that under the statute it is held that, unless the circumstances of malice are proved, the law will presume the unlawful killing murder of the second degree. Under the act, the unlawful killing is presumed to be murder, but not murder in the first degree. Whenever it appears from the whole evidence, that the crime was at the moment deliberately, or intentionally, executed, the killing is murder in the first degree; as if one, without uttering a word, should strike another on the head with an axe or other dangerous weapon, this would be deemed premeditated violence within the act. It will constitute the offense, if the

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circumstances of willfulness and deliberation were proven, although they arose and were generated at the period of the transaction. If the party killing had time to think, and did intend to kill, for a minute as well as for an hour or a day, it is a deliberate, willful and premeditated killing, constituting the crime of murder in the first degree. (State vs. Dunn, 18 Mo., 419; State vs. Hays, 23 Mo., 287; State vs. Starr, 38 Mo., 270.)

In a recent case in Pen'vania (Comm. vs. Drum, 58 Penn. St., 9,) Judge Agnew states the settled construction placed upon the act, as follows: "In this case we have to deal only with that kind of murder in the first degree described as willful, deliberate and premeditated. Many cases have been decided under this clause in all of which it has been held, that the intention to kill is the essence of the offense. Therefore, if an intention to kill exists, it is willful: If this intention be accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design, it is deliberate; and if sufficient time be afforded to enable the mind fully to frame the design to kill, and to select the instrument, or to frame the plan to carry this design into execution, it is premeditated. The law fixes upon no length of time as necessary to form the intention to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury from all the facts and circumstances in the evidence. * * * * * The proof of the intention to kill, and of the disposition of mind constituting murder in the first degree under the act of Assembly, lies on the Commonwealth: But this proof need not be express or positive. It may be inferred from the circumstances. If, from all the facts attending the killing, the jury can fully, reasonably and satisfactorily, infer the existence of the intention to kill, and the malice of heart with which it was done, they will be warranted in so doing.

"He, who uses upon the body of another, at some vital part, with a manifest intention to use it upon him, a deadly weapon, as an axe, a gun, a knife or a pistol, must, in the absence of qualifying facts, be presumed to know that his blow is likely

to kill; and knowing this, must be presumed to intend the death, which is the probable and ordinary consequence of such an act. He, who so uses a deadly weapon without a sufficient cause of provocation, must be presumed to do it wickedly or from a bad heart. Therefore he, who takes the life of another with a deadly weapon, and with a manifest design thus to use it upon him, with sufficient time to deliberate, and fully to form the conscious purpose of killing, and without any sufficient reason or cause or extenuation, is guilty of murder in the first degree."

Tested by these principles we have been unable to find any error in the instructions given by the court on this branch of the case. The first instruction tells the jury that to constitute murder in the first degree, according to the provisions of the statute of this State, the homicide or killing must have been committed by the party accused, willfully, deliberately, premeditatedly, and with malice aforethought; that if the party killing had time to think, and did intend to kill, for a moment as well as an hour or a day, then such killing is deliberate, willful, and premeditated killing, and then, when the act is committed deliberately, with a deadly weapon, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed; for the law infers that the natural or probable effect of any act deliberately done is intended by its actor.

In the same connection the court told the jury, that in regard to malice, as a general rule of law, every homicide is deemed malicious, unless it is shown that it was justified, excused or palliated; the proof of justification, excuse or palliation resting upon the accused, when the homicide is proven, unless evolved in testimony produced by the accusing party. Throughout the whole instruction it will be perceived, that the court charges that it is necessary that the act of killing should have been done deliberately in order to constitute murder in the first degree. The instruction is in fact taken from the opinions of this court on the subject, and has long since been considered the well settled and firmly established doctrine in this State.

The prisoner relied on insanity and provocation. It need only be said in reference to insanity, that we held in the State vs. Hundley, (46 Mo., 414,) that that was a question of fact to be submitted to and determined by the jury, like any other fact in the case, and the ruling of the court was in substantial compliance with that decision. The jury, after a consideration of the evidence, found by their verdict that no insanity existed, and we will not review their finding in that respect.

The remaining points arise on the fourth and fifth instructions. They are as follows:

Fourth—"If you believe and find from the evidence, that the defendant killed the deceased by reason of any former grudge against her, or because of his knowledge or suspicion of her infidelity to his bed, and that he committed the act of killing willfully, deliberately, and maliciously, you should find him guilty of murder in the first degree."

Fifth—"Where a man finds his wife in the act of adultery with another man, and at the moment he kills either his wife or her paramour, then the law, though not justifying the killing, mitigates the offense to manslaughter, because the character of the injury is such as the law presumes to excite that passion in the mind of the slayer, which precludes the idea of premeditation or malice. But it is only where the wife has been discovered in the actual act of adultery, that the law grants mitigation on the ground of passion."

There can be no valid ground urged against the fourth instruction. If the slaying was done willfully and deliberately to satisfy a prior, existing grudge, or upon a mere suspicion of improper conduct on the part of the wife, there is no justification in law. The evidence fully warranted the instruction, for it showed that long previous to the homicide the defendant procured the knife with which he committed the act, and that he habitually carried it, and had often threatened the life of the deceased. No man can be allowed to take a human life upon a mere suspicion of personal injury, and, if he does intentionally do so under such circumstances, he will be guilty of murder in the first degree.

There was really no evidence justifying the giving of the fifth instruction. The case does not show that on the night the homicide was committed, the accused found his wife in the act of adultery, or that in fact there was any other person with her; but it does show, that the wife was and had been for years a notorious prostitute, that she visited houses of ill-fame, and had prostitutes boarding with her, and that men were accustomed to come to the house to visit them. Of all this the defendant was well advised. He was perfectly aware of the character of his wife, and continued to live with her. He knew the prostitutes in the house, and ate at the same table with them. Under such circumstances, had he even discovered her in the act of adultery, it is very doubtful whether the law would have had much regard for any sudden passion displayed by him. At best the instruction was an abstract proposition of law, and not warranted by the testimony, though it could hardly have injured the defendant.

It is insisted nevertheless, that it was calculated to mislead, and that it was not sound as a declaration of law. But the court is abundantly supported by the authorities on the question. With one single exception, so far as my researches have extended, the books are unanimous. It is true, that if a homicide be committed under the influence of passion, or in heat of blood produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement by which the control of reason was disturbed, rather than any wickedness of heart or cruelty or recklessness of disposition, the offense is manslaughter only, and not murder.

But to reduce the offense to this grade, the reason must at the time of the act be disturbed or obscured by passion to an extent which might render a reasonable man liable to act rashly, without deliberation, and from passion rather than judgment. Therefore the cause of provocation must generally occur in the presence of the injured party; for then the law presumes that he acts upon a sudden impulse, without delib-

eration and before the blood has had time to cool. Park J., in *Regina vs. Fisher*, (8 Car. & P., 182), in speaking of the cause of provocation, says: "In all cases the party must see the act done." Bishop lays down the law in the same way. He says, "Thus, if a husband finds his wife committing adultery, and, provoked by the wrong, instantly takes her life or the adulterer's, or if a father detects one in the commission of the crime against nature with his son, and immediately avenges the wrong by the death of the wrong doer, the homicide is only manslaughter. But to entitle it to this tender consideration, the detection must be in the very act, which is supposed to stir so powerfully the blood of the injured person as to impair for the moment his reason; and if, after merely hearing of such an outrage the wronged individual immediately takes vengeance on the other, by pursuing and killing him, his offense is murder." (2 Bish. Crim. Law, § 638, citing 1 Hawk P. C., 98, § 36; Foster, 298; Reg. vs. Kelly, 2 Car. & K., 814; Pearson Case, 2 Lewin, 216; The State vs. John, 8 Ired., 330.)

In a case in Michigan (*Maier vs. The People*, 10 Mich., 212) the rule received a partial qualification. The prisoner offered evidence tending to show the commission of adultery by H. with the prisoner's wife. Within half an hour before the assault, the proof showed that the prisoner saw them going into the woods together under circumstances calculated strongly to impress upon his mind the belief of an adulterous purpose; that he followed after them to the woods; that they were seen not long after coming from the woods, and that the prisoner followed on in hot pursuit, and was informed on the way that they had committed adultery the day before; that he followed H. into a saloon in a state of excitement, and there committed the assault. The court held, that the evidence was proper as from it, it would have been competent for the jury to find that the act was committed in consequence of the passion excited by the provocation, and in a state of mind which would have given to the homicide had death ensued, the character of manslaughter only. The evidence showed, that the prisoner in following H. from the woods was laboring under

great excitement, that, when a friend told him on the way what had happened the day before, his passion was increased, and that, when he arrived at the saloon, the perspiration had broken out all over his face.

But of that case it may well be observed, that the facts were all so recent, and so commingled together that they might all be considered as a part of the *res gestæ*, and hence admissible because making up a part of the same transaction. In cases of that kind, where the prisoner is smarting under a provocation so recent and strong that he cannot be considered as being at the time the master of his own understanding, the offense may be reduced to manslaughter, but as a general principle for the interest and well being of society the old rule is the better one.

We have now considered this whole record, and the most serious objection that we have been able to find is in the action of the court in impaneling the jury. As the law says, that the first twelve names remaining on the list shall be recorded, and they shall be the jury to try the cause for which they are selected, we do not feel at liberty to sanction the substitution of others in their place. If two may be set aside by the court of its own motion, so may the whole twelve if there are twenty-four remaining on the list, and thus the last instead of the first would be the jury. The statute is plain and easily carried out, and we are not inclined to approve a practice which needlessly and clearly violates it.

Wherefore the judgment must be reversed and the cause remanded. The other judges concur.

Davis v. Bader.

CHARLES A. DAVIS, Respondent, *vs.* HERMAN BADER, Appellant.

1. *Practice, civil—Money had and received—Suit against collector of taxes for money received by him as taxes.*—A. sued by B. for money had and received by B. to A.'s use. The only evidence in the case was, that B. was the collector of taxes, and as such received this money in payment of A.'s taxes. *Held*, that after the reception of this money by B. it no longer belonged to A., but to the State and county, and that A. had no standing in court.
2. *Taxes—Collector's failure to credit payment—Twice paid—How recovered back.*—If B. the collector, returns A.'s taxes as delinquent, when he has paid them, and A. has been compelled to pay them twice, it may be, that A. may recover them back from B., or be substituted to the rights of the State and county.

Appeal from Cape Girardeau Circuit Court.

Lewis Brown, for Appellant.

I. There is no cause of action stated. It is the statement of a good and sufficient cause of action in the petition that gives vitality and force to the judgment. (*Claffin vs. McDonough*, 33 Mo., 412; 1 Chitty Pl., [6 Ed.] 129.)

II. The collector was the authorized agent of the State and county, and any payment to him of taxes assessed, extinguishes the tax debt.

Louis Houck, for Respondent.

I. The collector received the money as the agent of the plaintiff to pay the taxes, but instead of paying the money, put the amounts in his pockets. It would seem to be clear, that he ought to be compelled to repay it to the plaintiff.

ADAMS, Judge, delivered the opinion of the court.

This was an action for money had and received by the defendant to the plaintiff's use. The plaintiff filed a bill of particulars, charging the defendant with the reception of one hundred and seventy dollars and eighty-five cents from his agent on the 25th day of November 1869.

The answer denied all the allegations of the petition. The case was submitted to a jury, and they found a verdict for the plaintiff. No instructions were asked or given on either side.

As appears from the bill of exceptions, the only evidence

given was to the effect; that the defendant was the collector for Cape Girardeau county in 1869, and had in his hands the tax-books for that year, and that the plaintiff was charged on the tax-books with the sum of one hundred and seventy dollars and eighty-five cents; that he paid to the defendant the said sum assessed against him through an agent. This evidence was objected to by the defendant, but the court overruled the objection, and he excepted.

On the part of the defendant, evidence was introduced tending to show, that, as collector of said county, he had received the taxes assessed against the plaintiff, and had received no other money from the plaintiff for any other purpose than for his taxes.

This was the substance of all the evidence in the case, as appears from the bill of exceptions.

The defendant filed a motion for a new trial upon the ground, that there was no evidence to support the verdict. The court overruled this motion, and the defendant excepted, and from the judgment rendered against him on the verdict, he has appealed to this court.

Upon the evidence as presented by the bill of exceptions, the plaintiff had no standing in court. The only money received by the defendant was for taxes due from the plaintiff to the State and county. After the reception of this money by the defendant as collector, it no longer belonged to the plaintiff, but to the county of Cape Girardeau, and State of Missouri. It was not had and received by the defendant for the use of the plaintiff, but for the use of the State and county. The evidence therefore, as it stands before us in the bill of exceptions, had no tendency to prove the plaintiff's case.

It is intimated in the briefs of counsel, that the defendant failed to perform his duty as collector, by omitting to credit the plaintiff on the collector's book, by the amount of the taxes he paid, and that he made a false return by returning his taxes for 1869 as delinquent, and that he had to pay the same taxes to a subsequent collector. This case is not made by the pleadings or the evidence, and is not before us. It may be, if the

plaintiff was compelled to pay the same taxes to a subsequent collector by the official fault of the defendant, that he ought to be allowed to recover them back from the defendant, or be substituted to the rights of the State and county. But what his specific remedies may be in the premises, it is unnecessary for us now to decide; the point is not before us, and we cannot pass upon it judicially.

Judgment reversed and the cause remanded; the other judges concur.

STATE OF MISSOURI, Respondent, *vs.* ALFRED WILLIAMS, Appellant.

1. *Practice, criminal—Trial—Imprisonment—Attempts to escape.*—In a criminal case attempts to escape by the defendant after arrest are admissible in evidence.
2. *Practice, criminal—Stolen property—Possession of.*—The recent possession of stolen property is presumptive evidence of the guilt of the possessor, and conclusive unless explained.

Appeal from Macon Circuit Court.

Barrow & McGindley, with Guyselman & Pope, for Appellant.

SHERWOOD, Judge, delivered the opinion of the court.

The defendant was indicted for grand larceny: After the usual introduction, the indictment charges:

"That Alfred Williams, late of said County of Macon, on the 22nd day of August, A. D. 1872, at said County of Macon, one pair of boots of the value of eleven dollars of the goods and chattels of Charles Waggenerman, then and there being found, feloniously did steal, take and carry away, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State."

In support of the allegations of the indictment, evidence was adduced, which, although circumstantial, tended very strongly to fasten guilt upon the accused.

State v. Williams.

During the progress of the trial, the sheriff was introduced as a witness on the part of the State, and was asked, if the prisoner, while imprisoned, had made any attempt to escape, and, against the objections of the defendant's counsel, was permitted to answer the question, which he did in the affirmative.

At the conclusion of the testimony, the court gave, on behalf of the prosecution, such instructions as are usually given in prosecutions of this character, and which were entirely applicable to the facts as detailed in evidence, and, after giving on the part of the defendant an instruction respecting reasonable doubt, refused the other instructions asked in his behalf.

The jury found a verdict of guilty; and after an unsuccessful motion for a new trial, this cause comes here on writ of error.

Numerous errors are assigned by defendant's counsel, of which those only worthy of note will now be commented on.

No serious objection can be successfully urged to the indictment; it sets forth with sufficient clearness and precision all the ingredients of the offense charged. (W. S., 1090, § 27; State vs. Wilcoxon, 38 Mo., 370; State vs. Stumbo, 26 Mo., 306.)

It was perfectly competent for the State to prove the attempted escape of the prisoner. Flight has always been held as inducing a strong presumption of guilt, and attempts to escape during imprisonment are placed by the authorities on the same footing. (1 Whart. Am. Crim. L., § 714; Fanning vs. State, 14 Mo. 386).

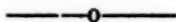
There was no error in the instruction, which told the jury, that the recent possession of stolen property is presumptive evidence of the guilt of the possessor. Such possession, unless explained, either by direct evidence, or attending circumstances, or the character and habits of the party with whom the property is found, or by some other mode equally satisfactory as to the innocence of the accused, will be taken as conclusive. (1 Greenl. Evid., §§11, 34; *Id.* § 32; State vs. Creson,

38 Mo., 372; State vs. Floyd, 15 Mo., 349; Rosc. Crim. Evid., 16, 18.)

The other instructions for the State were equally as unobjectionable as the one just cited, and placed the whole matter very fairly before the jury; and consequently, no prejudice could have resulted to the defendant, even if the instructions asked on his part had been unexceptionable.

And the point urged that the defendant was not present in court, when the verdict was returned and judgment entered thereon, is contradicted by the record itself.

For these reasons, with the concurrence of the other judges, the judgment will be affirmed.



THE CITY OF HANNIBAL, Plaintiff in Error, vs. WINCHELL,
EBERT & LAMB, Defendants in Error.

1. *Corporations, municipal—Hannibal, City of—Wharves, altering and extending—Statutes, construction of.*—The power to alter wharves, given to the city of Hannibal (Amended Charter of 1860-1), includes a power to extend or diminish them.

Error to Ralls Circuit Court.

Arthur B. Wilson, for the Plaintiff in Error

I. The city had power to condemn private property for the establishment of a public wharf. (Sess. Acts, 1851, p. 333, § 22; Sess. Acts 1860-1, p. 247, § 15; City of Hannibal vs. Han. & St. Joe R. R., 49 Mo., 480.)

II. The power to take private property for opening a public wharf includes *a priori* the power to establish a public wharf. Statutes made in *pari materia* are to be taken and construed together in the light of each other, the better to determine the ultimate object of inquiry. (6 Bac. Ab. Tit., Stat., 382; Rex vs. Loxdale, 1 Burr., 447; Church vs. Croker, 3 Mass., 71.) Any doubt, as to the power of the city under § 22 of Act 1851, *supra*, to condemn private property for wharf purposes, is entirely removed by § 15 of the Act of 1860-1,

supra, which not only delegates, but unequivocally and distinctly assumes, and recognizes, the existence of the power in the city. (Dill. Mun. Corp., § 657; *St. Louis vs. Russell*, 9 Mo., 507; *City of Hannibal vs. Han. & St. Joe R. R.*, 49 Mo., 480.)

III. It nowhere appears that any land whatever was to be taken from defendants for the proposed wharf, and the finding of the jury, so far as they are concerned, was solely with reference to damages and benefits to the adjacent block, which they owned.

IV. Had the jury, however, failed to ascertain the actual value of the land proposed to be taken, such fact would not of itself justify a dismissal of the proceedings. The Circuit Court should try the case *de novo*, like appeals from a justice of the peace; (Sess. Acts 1870, p. 302, §§ 1, 5,) and such being the case, it was error to dismiss the proceedings "for any error, defect or other imperfection" in the proceedings before the jury. (*Matlock vs. King*, 23 Mo., 400; *McDowell vs. Strong*, 35 Mo., 505.)

Geo. H. Shields, with whom were W. C. Forman and W. P. Harrison, for Defendants in Error.

I. The city of Hannibal had no power to condemn private property for public use as a "wharf."

(a.) The right of eminent domain vests primarily in the legislative department of the State. It may be delegated to municipal corporations, but being a delegated power it must be expressly not impliedly conferred. (Dill. Mun. Corp., §§ 468, 469, and notes.)

(b.) Corporate powers can never be created by implication nor extended by construction. (*Penn. R. R. Co. vs. Canal Com'srs.*, 21 Penn. St., 9; *Sedg. Stat. & Const. Law*, 338-9, 351; *Beaty vs. Lessee of Knowler*, 4 Pet., 152; *Cooley Const. Lim.*, 194-5, 530.)

(c.) The only implied powers of a municipal corporation are those necessary to carry into effect those powers expressly granted or those essential to the declared objects and pur-

poses of the corporation not simply convenient, but indispensable. (Dill. Mun. Corp., 101-2-3-4 and notes; *Minturn vs. Lane*, 23 How. (U. S.), 435; *Thompson vs. Lee Co.*, 3 Wall., 327; *Leonard vs. Carter*, 35 Miss., 189; *Lafayette vs. Cox*, 5 Ind., 38; *Willard vs. Killingworth*, 8 Conn., 247; 10 Conn., 442; *New London vs. Brainard*, 22 Conn., 552.) With these limitations the power of the city must be construed, and if found doubtful or defective, the doubt must be resolved in favor of the citizen and against the power.

II. The power is, if at all, conferred by two sections in the charter; the first of which (Sess. Acts 1851, p. 333, § 22) grants authority "to erect, repair and regulate public wharves and docks;" and the second (Sess. Acts 1860-1, p. 247, § 15), uses these words: "When it shall become necessary to take private property for opening, widening or altering any public street, lane, avenue, alley, wharf or square, the Mayor shall cause," &c.; and no power exists in the charter on this subject. To "erect," means to construct, improve, grade or pave. To "repair," means to put in order, and keep so, that which is already "erected."

To "regulate," means to prescribe manner of use, charges, &c.; true, one of the words carries with it the idea of "establishing," but admitting *arguendo*, that the power to "establish" exists, it does not include power to "extend" or power to take by the exercise of the right of eminent domain, private property for this purpose.

III. The right of condemnation, if ever conferred by implication, would exist only in some municipal need incidental to the existence of the corporation, usual to be conferred and absolutely necessary, such as the power to open streets, lanes, alleys, &c. The use of wharves is not so necessary. Their erection is "an extra municipal, special power, conferred only on corporations bordering on high seas or navigable waters, and is not one strictly relating to municipalities." (Dill. Mun. Corp., 117, § 6.) Hence the power must be specific and express, as there is no intendment in its favor.

IV. The 15th section of the charter, 1860-1, is merely

directory of the manner of proceeding in condemnation, and of itself confers no power to condemn. It presumes by its terms a grant of power to condemn elsewhere. "When it becomes necessary to take" does not mean "The city can take when necessary." It means, "The power to take being granted, you shall exercise it when necessary in the following manner:"

V. The charter of 1851 (§ 16), granted power to "open, alter, widen, extend, establish, grade, and pave the streets, sidewalks, alleys, avenues and private roads," and in section 1 the language, "when it shall become necessary," is used, and it evidently was intended to be construed with § 16, granting the power to condemn, &c. In the amendment of 1860-1, § 15, the words "wharf and square" were for the first time used, and they were interpolated without any change of the section granting power, or without enacting any section conferring the power to condemn for "wharves or squares;" hence the reasoning of the case of *City of Hannibal vs. Han. & St. Joe R. R. Co.*, 49 Mo., 480, fails in the case at bar both in the existence of the power to "open and establish" streets referred to by the court, and evidently being § 16, p. 336, Acts 1851, and also in the suggestion of the court, that "otherwise this important power would be entirely withheld from the city," referring to it as a necessary power, not so however here.

VI. The argument of plaintiff's counsel, that if the power is not expressly granted by § 22 of Acts 1851, it is by section 15 of October, 1861, "because it not only delegates but unequivocally and distinctly assumes and recognizes the existence of the power in the city," is based on an erroneous construction of the case of *St. Louis vs. Russel*, 9 Mo., 507. That case has no application here, and Judge Dillon refers to that case (*Dill. Munc. Corp.*, § 657), and immediately cites cases holding to a different doctrine. (*Dill. Munc. Corp.*, 615 n.; *Paine vs. Spratley*, 5 Kan., 525; 25 Iowa, 163; 23 Iowa, 410.)

VII. The value of the private property proposed to be taken was not assessed by a jury of six disinterested persons;

City of Hannibal v. Winchell, Ebert & Lamb.

nor did the jury first ascertain the actual value of the land proposed to be taken for the purpose of a wharf without reference to the proposed improvements. (Amended Charter of 1860-1, § 15.)

VIII. The verdict should have been set aside; but being approved by the acting Mayor, *pro tem*, the proceedings were properly dismissed. (Lock vs. Penn. R. R. Co., 25 Penn. St., 394.) This case is exactly in point on this question.

IX. The taking of private property in derogation of the rights of the citizen can only be justified on the ground of necessity, and, when the power is exercised, the act conferring the right must be strictly complied with. (Leslie vs. St. Louis, 47 Mo., 474; Shaffer vs. St. Louis, 31 Mo., 264; Lind vs. Clemens, 44 Mo., 540; Anderson vs. St. Louis, 47 Mo., 479; Cooley's Con. Lim., 528; Gillinwater vs. Miss. R. R., 13 Ill., 1; Stalford vs. Worn, 27 Cal., 171.) The jury did not follow the law conferring the power.

NAPTON, Judge, delivered the opinion of the court.

The only question in this case seems to be in relation to the validity of a city ordinance of the city of Hannibal, passed February 9th, 1870. The proceedings under the ordinance, for the assessment of the damages to defendants, occasioned by the extension of the wharf in front of their property, are admitted to have been regular; but they were dismissed upon motion, for the reason that the city council had no power, at the time said proceedings were instituted, to condemn private property for a wharf. There were other objections, but this is the main one, and the only one necessary to be considered here.

The charter of the city, passed in 1851, grants the power to the city authorities "to erect, repair, and regulate public wharves and docks;" and the amended charter of 1860-1 declares, "when it shall become necessary to take private property for opening, widening or altering any public street, lane, avenue, alley, wharf or square, the mayor shall cause certain proceedings," &c.

It is insisted, that the power to erect does not *ex vi termini* include a power to establish; and if it does, it does not include a power to extend a wharf already established.

We cannot perceive the force of this nice discrimination. It is clear, that the legislature in 1861 understood the previous charter as granting the power "to open, widen or alter public wharves," and made provision for exercising this power.

A power to alter a wharf would seem to mean a power to extend it or diminish it.

There was, therefore, no ground for dismissing the proceedings of the city, by the Circuit Court of Ralls county, and the judgment is reversed and the cause remanded. The other judges concur.



**P. H. TUCKER, Respondent, vs. ST. LOUIS, KANSAS CITY AND
NORTHERN RAILWAY Co., Appellant.**

1. *Practice, civil—New trial, refusal of—When Supreme Court will interfere.*—The Supreme Court will not interfere with the discretion of lower courts, in refusing to grant a new trial, unless a strong case is made showing an improper exercise of discretion to the prejudice of the party complaining.
2. *Practice, civil—New trial—Surprise.*—A cause by agreement of parties, and by order of court, was set for a certain day of subsequent term, but was called and tried the day before, in the absence of the defendant. It appeared by affidavits that the defendant appeared at the appointed time, ready to try the cause, when he first learned of the trial, and it also appeared that a witness informed the plaintiff's attorney during the trial that the defendant's attorney understood and informed witness that the cause was to be tried the next day. *Held*, that the court should have granted a new trial on the ground of surprise.
3. *Railroads—Brakeman, injuries to—Station-agents—Conductors—Services of physicians.*—Station-agents and conductors of a railroad are not authorized, by virtue of their positions, to employ a physician at the expense of the railroad to attend to one of its brakemen injured by its cars.

Appeal from Montgomery Circuit Court.

John M. Woodson, for Appellant.

I. The court exercised its discretion unsoundly in its refu-

sal to set aside the judgment by default, and appellant has suffered positive injustice thereby. (Nordmanser vs. Hitchcock, 40 Mo., 178; Kribben vs. Eckelkamp, 34 Mo., 480; Florez vs. Uhrig's, Adm'r, 35 Mo., 519; Frazier vs. Bishop, 29 Mo., 447.)

A. H. Buckner, for Respondent.

I. The judge has nothing whatever to do with the setting of the docket; that is expressly given to the clerk.

II. Defendant's attorney made no effort to get correct information from the proper source as to the time when the case was set. It is either a mistake as to the law regulating the duties of clerks, or negligence on the part of defendant's attorney, or both combined, that is shown by the affidavits and motion of defendant, and in neither case will this court interfere with the action of the court below. (Nordmandser vs. Hitchcock, 40 Mo., 178; Steigers vs. Darby, 8 Mo., 679; Jacob vs. McLean, 24 Mo., 40.)

III. But there is in fact, no good defense shown to the action. The affidavits state neither evidence nor facts, from which this court can say that plaintiff was not employed to attend to the injured man.

VORIES, Judge, delivered the opinion of the court.

This action was brought by the respondent against the appellant before a justice of the peace on the following account:

"St. Louis, Kansas City and Northern Railway Company, in account with Dr. P. H. Tucker. For surgical and medical treatment of Jerome Dollihan, at the hotel in High Hill, Montgomery county, Missouri, as wounded on the sixth day of March, 1872, the cars running over and fracturing his leg, so that amputation was necessary.

March 6th, to March—, 1872,

To surgical and medical treatment of Jerome Dollihan, \$75.00."

A trial was had before the justice, where the plaintiff recovered a judgment for the full amount of his account.

From this judgment the defendant appealed to the Montgomery Circuit Court. On the 10th day of November, 1872, the following entry appears in the cause, on the records of the Montgomery Circuit Court :

"Now at this day, appears the parties by their respective attorneys, and by consent this cause is continued to the December adjourned term (4th day, No. 162.)"

Afterwards, on the 18th day of December, at the December adjourned term, and on the 3d day thereof, the case was called for trial, the plaintiff appearing, but the defendant making no appearance. The case was tried by the court, and a judgment rendered against the defendant for seventy-five dollars.

On the next day, the same being the 4th day of the December adjourned term, the defendant appeared and filed its motion for a new trial, and set forth, as the grounds upon which it relied for a new trial, among other things, the following :

Because the verdict and judgment were contrary to the evidence and the law, and because at the regular October term of the court the cause was by the consent of the parties, and by the order of the court, specially set for the 19th day of December, 1872, and on the 4th day of the said December adjourned term ; whereas, the said cause was called for trial and a verdict and judgment rendered therein on a day prior thereto, that is to say, on the 18th day of December, 1872, the same being the third day of said adjourned term of said court ; which trial was had on said day without the knowledge or consent of the defendant or its attorney or agents, and in their absence ; that defendant had a good defense to the action, and was present on the 4th day of said adjourned term, the day the cause was set for trial by the agreement of the parties, ready for the trial of said cause.

With this motion defendant filed affidavits in support thereof. Afterwards said motion was heard, and overruled, by the court, and the defendant at the time excepted, and appealed to this court.

This court will not interfere with the discretion of inferior

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courts in refusing to grant new trials, unless a strong case is made showing an improper exercise of discretion to the prejudice of the party complaining. (Nordmanser vs. Hitchcock, 40 Mo., 178; Kribben vs. Eckelkamp, 34 Mo., 480.)

In the case under consideration it is shown by the affidavits, filed with the motion for a new trial, that at the regular October term of the Montgomery Circuit Court, the case was continued by the consent of both parties, and by the order of the court specially set for hearing on the 19th day of December, 1872, and that the defendant and its agents and attorneys had received no notice of any change having been made in reference to the time for the hearing of the cause, until the 19th day of December, 1872, when the defendant's attorney appeared in court for the purpose of trying the cause, when he was informed that the case had been tried in his absence on the day before, and judgment rendered against the defendant. It further appeared, that the plaintiff's attorney had been notified before the judgment was rendered on the 18th day of December, 1872, by a witness in the case, that the defendant's attorney understood, and had notified the witness, that the case was set for hearing on the 19th day of December, 1872.

The affidavits further stated, that the defendant had a good defense to the action, and could prove on a new trial of the case, that plaintiff was never employed by the defendant, or any authorized agent of defendant, to render the services sued for, and that neither the defendant or any authorized agent of the defendant had ever promised to pay plaintiff therefor.

The facts stated in these affidavits were uncontradicted, and the minutes of the court show, that the cause had been continued by the consent of the parties to the December adjourned term, 4th day, which was the 19th day of December, 1872.

It is difficult to imagine how a stronger case of surprise could be made out than was made in this case. The cause had been continued, by the agreement of the parties, to the 4th day of the December adjourned term, and so entered on

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the minutes of the court. The attorney for the defendant had no right to expect, that this arrangement would be changed. No want of diligence was shown on his part; he was ready, prepared for trial, on the day fixed; the plaintiff's attorney was informed that defendant was preparing for trial on the 19th, the day fixed by the parties for the trial, and yet, without any notice to the defendant or its attorney, the case was set for, called, and tried, on a different day. In such a case the court should not have hesitated to grant the defendant a new trial.

It further appears from the bill of exceptions in the case, that the following was all the evidence given by the plaintiff in the trial of the cause:

"The plaintiff, to maintain the issues on his part, offered evidence tending to prove that on or about the 6th day of March, 1872, at High Hill, Montgomery county, Missouri, one Jerome Dollihan, who was a brakeman in the employ of defendant, was injured by the cars of defendant; that Geatt W. Bixler, station-agent of said defendant, at said town of High Hill sent a boy for a physician, and the boy called the plaintiff, who rendered certain services, which were worth the sum of seventy-five dollars; that one Hamilton, who was conductor of the train on which Dollihan was injured, told plaintiff to give Dollihan such attention as he needed, and that he would be paid therefor; that one H. M. Derry, also told the plaintiff to give him necessary attention; that a few days afterwards J. L. Hinckly told H. M. Derry to see that Dollihan wanted for nothing, and that defendant would see the bills paid."

One of the grounds stated in the motion for a new trial was, that the verdict and judgment were against the evidence.

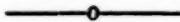
If there was legal evidence in the case, which tended to uphold the findings and judgment of the court below, this court would not interfere with the finding of the court as to the facts; but it will appear by an examination of the evidence that the facts which, it is stated in the bill of exceptions, the evidence tended to prove, when all taken to be true,

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do not even tend to prove the liability of the defendant to pay for the services of the plaintiff sued for. It is shown, that the station-agent of defendant, when the young man was injured, directed a boy to go for a doctor, and that the boy brought the plaintiff, and that the conductor on the cars of defendant told plaintiff to give the wounded man attention, and he would be paid; but there is no pretense of any evidence by these witnesses, that they had any authority to employ a physician on defendant's account, or that they ever pretended to employ plaintiff on defendant's account. It is only shown that they were agents of defendant in conducting its railroad business, which of itself could certainly give them no authority to employ physicians, for the defendant, to attend to, and treat, persons accidentally injured on the roads. The other witnesses, Derry and Hinckly, are not shown to be connected with the business of defendant in any manner whatever, or that they were ever known to the agents or officers of defendant. There is no evidence in fact, which tends to prove any liability on the part of the defendant to pay plaintiff for the services rendered.

With the views above taken of this case the judgment must be reversed.

Judge Sherwood not sitting; the other judges concurring the judgment is reversed and the cause remanded.



STATE OF MISSOURI, Appellant, *vs.* JAMES KEEL, Respondent.

1. *Practice, criminal—Indictments—Perjury before grand jury—Averments—Jurisdiction over matters of inquiry.*—In an indictment for perjury before a grand jury, it is not necessary to allege that the grand jury had jurisdiction over the subject matter of the inquiry. (W. S., 477, § 7.)
2. *Practice, criminal—Indictments—Venue.*—It is not necessary to state any venue in the body of an indictment. The venue stated in the margin is taken to be the venue for all the facts stated in the body of the indictment. (W. S., 1090, § 26.)
3. *Practice, criminal—Indictments—Perjury—Allegations—Materiality of testimony.*—In indictments for perjury, the facts, showing the materiality of the testimony, must be plainly and distinctly set forth.

Appeal from Madison Circuit Court.

B. B. Cahoon, for Plaintiff in Error.

I. The indictment contained all the allegations necessary at common law to constitute the offense of perjury. (Train & H. Preced. Indict., 405, 435.)

II. The indictment fully sets forth the facts sworn to, showing they were such material matters as are required to charge the offense. (State vs. Holden, 48 Mo., 93; State vs. Bailey, 34 Mo., 350; Hinch vs. State, 2 Mo., 158; Whart. Crim. Law, § 2263 and note; Whart. Crim. Prac., 577.)

III. The indictment both in its body and in the caption sets out the venue. But under our statute, the indictment is good if no venue is stated. (W. S., 1090, § 27; State vs. Goode, 24 Mo., 361; State vs. Taylor, 21 Mo., 477; State vs. Ames, 10 Mo., 743; McDonald vs. State, 8 Mo., 283; State vs. Palmer, 4 Mo., 453.)

IV. It was not necessary to set out in the indictment in what county the arson was committed, or any part of the record, proceedings or process, in relation to the arson. (W. S., 477, §§ 7, 8, 9.) These sections are copied from the English statute of 1750, (Stat. 23, Geo. 2, ch. 11,) and the same rules of construction apply. The inference of law was that the offense was committed in Madison county, for the jury was not authorized to examine into the matter, unless it was, and until the contrary is shown, the law presumes they did their duty.

V. Inferences and conclusions of law, or matters of which judicial notice must be taken, need not be averred. W. S., 1020, § 39.) All such matters are only incidental and collateral, and are required to be alleged, but in a general way. (2 Bish. Crim. Prac., § 844; 1 *Id.*, § 304 *et seq.*)

VI. The indictment follows the precedent which is set out by the text writers (Train & H. Preced. Indict., 435), and that precedent is taken from Comm. vs. Parker, 2 Cush., 212.

W. N. Nalle, for Respondent.

I. The respondent cites the following authorities in support of the judgment of the court below: *Hinch vs. State*, 2 Mo., 158; *Martin vs. Miller*, 4 Mo., 47; *State vs. Hamilton*, 7 Mo., 300; 3 Whart. Am. Crim. Law, § 2246; *State vs. Holden*, 48 Mo., 93.

II. If it was necessary to show who was present at the time and place designated in the indictment, it was, in order to constitute perjury, necessary to ask the witness a direct question, as to who were present then and there. The facts, set forth in the indictment as constituting the offense, were merely responses to questions preliminary to a direct question. (3 Whart. Crim. Law, §§ 2228, 2229; *State vs. Holden*, 48 Mo., 93.)

III. If the facts set forth show that an allegation deduced from those facts, is untrue, the pleading ought to be held bad. (*State vs. Holden*, 48 Mo., 93.)

SHERWOOD, Judge, delivered the opinion of the court.

James Keel was indicted for perjury in the Madison Circuit Court. The indictment is as follows:

“STATE OF MISSOURI, }
County of Madison. } ss.

In the Circuit Court of Madison County, Missouri:
To September Term A. D., 1872.

The grand jurors of the State of Missouri now here in court, duly impaneled, sworn and charged to inquire within and for the body of Madison County, upon their oath do present, that at the Circuit Court begun and holden at Fredericktown within, and for the County of Madison, on the 4th Monday in March, 1871, by Hon. Wm. Carter, Judge of said Circuit Court, before the grand jurors of said State of Missouri, for said County of Madison, which said grand jurors were then and there duly and legally convened, having then and there been duly and legally impaneled and sworn according to the provisions of law in that behalf, a certain complaint was then and there made and presented against one Joel Lunsford, and certain other persons whose names are unknown

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to the jurors aforesaid, for the crime of arson, and that, in the investigation and hearing of said complaint before said grand jurors, so impaneled and sworn, as aforesaid, one James Keel, late of said county, was subpoenaed, and did then and there personally appear as a witness in regard to said complaint, and that the said James Keel, being then and there, was duly sworn by the foreman of said grand jurors and grand jury, and took upon himself his corporal oath; the said foreman of said grand jurors as aforesaid, to-wit: One Radcliffe B. Lockwood being then and there duly and legally authorized and empowered, and having competent authority to administer the said oath; and that then and there, it became important and was material to the issue, and to the matter then material to the issue and investigation of said complaint before said grand jurors impaneled as aforesaid, whether on the night of the commission of said crime of arson, to-wit: On the night of the 23rd day of December, 1869, a ball was not had and held at the residence of the mother of said James Keel, to-wit: Mrs. Maria Keel, at Mine La Motte, in said county, whether at said ball, at said place, on said night, said James Keel was not then and there present at the residence of his said mother, the said Maria Keel; whether he, the said James Keel had not been at a ball, or had not played a fiddle at a ball, at the said residence of his said mother, and whether he, the said James Keel, at said ball, at said place, on said night, did not play a fiddle; that it was material to the issue, to the matter then material to the issue and investigation of said complaint, then and there to discover who was then and there present at said ball at said place, because said grand jurors, in pursuing said investigation, had discovered said ball was held as aforesaid, and they had good reason to believe, and afterwards so discovered, that said Joel Lunsford and certain persons whose names are unknown to the jurors aforesaid, who were implicated with said Joel Lunsford in the commission of said crime of arson, were present at said ball at said time and place, and, after leaving and departing from the same, committed said crime of arson, and that the interrogatories and questions put

to said James Keel by said grand jury, and by said foreman, were put and administered for the purpose of ascertaining as to whether at said ball, at said time and place, said James Keel was not then and there present at the residence of his said mother, and whether he, the said James Keel at said ball, at said time and place, did not play a fiddle at said ball, so as to learn whether or not said Joel Lunsford and said other persons, whose names are unknown to the jurors aforesaid, implicated with said Joel Lunsford in the commission of said crime of arson, were present at said ball at said time and place, and, after leaving and departing from the same, committed said crime of arson; and that, thereupon the said James Keel, being so sworn and produced as a witness as aforesaid to-wit: On the 4th day of April, 1871, then and there, unlawfully, feloniously, willfully, corruptly and falsely did testify and swear as in and to said material issue, to the matter then material to the issue and investigation of said complaint, as follows, to-wit: That he, meaning the said James Keel, was not present at the residence of his mother, the said Mrs. Maria Keel, at Mine La Motte, in said county on the night of the 23rd day of December, 1869; that he, meaning the said James Keel, did not, at said ball, held at the residence of his mother, the said Mrs. Maria Keel, on the night of the 23rd day of December, 1869, play a fiddle, and that he, meaning the said James Keel, had not been at a ball, and had played a fiddle at a ball, at the residence of his mother, the said Mrs. Maria Keel, since he, meaning the said James Keel, was married; whereas, in truth and in fact, the said James Keel was present at the residence of his mother, the said Mrs. Maria Keel, at Mine La Motte, in said county on the night of the 23rd day of December, 1869; whereas in truth and in fact, the said James Keel, did, at said ball, held at the residence of his mother, the said Mrs. Maria Keel, on the night of the 23rd day of December, 1869, play a fiddle, and whereas in truth and in fact he, the said James Keel had been to a ball and had played a fiddle at a ball, at the residence of said mother, the said Mrs. Maria Keel, since he the said James Keel, was and had been mar-

ried. And so, the jurors aforesaid, upon their oath aforesaid, do say, that said James Keel, on the said 4th day of April, 1871, at and in the county aforesaid, before the said grand jurors, and before said grand jury of said county, (the said foreman of said grand jurors then and there having such power and authority as aforesaid) by his own act and consent, in manner and form aforesaid, falsely, feloniously, willfully, wickedly and corruptly, did commit willful and corrupt perjury," etc., etc.

The defendant filed his motion to quash the indictment, alleging among other things in said motion; that sufficient facts were not stated in the indictment to enable the court to determine the materiality of the testimony therein set forth; that it did not appear, that the grand jury had jurisdiction of the subject matter of the inquiry; that no venue was given as to the alleged arson, and no time, place or circumstance connected with that alleged offense, set forth; that the testimony of the defendant, as set forth in the indictment, could not by any possibility be material to any issue that could arise upon the subject of arson.

This motion was successful. The indictment was quashed and the State has appealed.

There is nothing in the points raised by the motion, that it did not appear that the grand jury had jurisdiction over the subject matter of the inquiry, nor that no venue as to the crime of arson, was set forth. For our statute, respecting indictments for perjury, only requires the substance of the offense charged to be set forth; by what court or official the oath was taken, averring the competency of such court or person to administer the same, together with the proper averments to falsify the matter wherein the perjury is assigned, and does not require the setting forth of the authority of the court or person before whom the perjury was committed.

And no venue is necessary to be stated in the body of the indictment. That stated in the margin is "taken to be the venue for all the facts stated in the body of the indictment." (W. S., 477, § 7; 1090, § 26.)

In both of these respects the indictment is well enough. It sufficiently sets forth the jurisdiction of the grand jury, and the county in which the arson is alleged to have been committed; but it signally fails to show, that the testimony of the defendant was at all material. That testimony may be false in every particular, and still it does not appear, that it has even the slightest or remotest bearing on the question as to who committed the alleged arson.

If the fact of the presence of the defendant at the ball were a necessary link in the chain of circumstances, whereby guilt could be fastened on those who perpetrated the arson, it was indispensable, that this should have been plainly and distinctly set forth, in order that its materiality could be at once apparent.

Nor is the radical defect in the indictment, which I have pointed out, in the least aided or cured by general averments, that the testimony of defendant was material. For such statements as these are but allegations of a legal inference, and not of a distinct fact. It only belongs to the province of grand jurors to state facts in their indictments. They must leave the legal inference deducible from those facts to be drawn by the court.

Our statutes have done much towards simplifying the forms of indictments, but the absolute necessity of setting forth the essential ingredients of crime still remains, undiminished by statutory innovation.

There was no error in quashing the indictment, and the judgment of the court below is affirmed. The other judges concur.

Transier v. St. L., K. C. & N. R. R. Co.

JOHN TRANSIER, Respondent, *vs.* ST. LOUIS, KANSAS CITY &
NORTHERN RAILWAY COMPANY, Appellant.

1. *Practice, civil—Appeal from a justice of the peace—Amendments in the Circuit Court—Constable's return.*—In an appeal case from a justice the Circuit Court can allow the constable's return to be amended; for the Circuit Court can do whatever the justice can.
2. *Practice, civil—Evidence—Corporate existence—Appeal bond.*—The appeal bond given by the appellant, in which appellant was a party by its corporate name signed by its president and secretary, is admissible in evidence to prove its corporate existence.
3. *Practice, civil—Appeal from justices—Entry of appearance—Right of continuance.*—In a cause appealed from a justice, but not on the day of judgment, if the appellee fail to enter his appearance on or before the second day of the term, the cause is not triable at the first term, unless by consent of both parties. [Nay vs. Han. & St. Joe. R. R., 51 Mo., 575.]

Appeal from Warren Circuit Court.

John M. Woodson, for Appellant.

I. The court erred in allowing the constable's return to be amended, because it had no authority under the law to amend the return, nor to direct a constable, not an officer of the court, to come into that court to alter or amend a record which has been thus certified into it. In all the cases which have been before this court, such amendment has been allowed in the court into which the return was made, and only in the appellate court after verdict rendered. (Muldrow vs. Bates, 5 Mo., 214; Webster vs. Blount, 39 Mo., 500; W. S., 1036-1037, §§ 17, 19, 20.) The language of the different sections warrants the construction, that they are only applicable to amendments in courts of record, etc. (W. S., 807, § 16.)

II. The motion for a continuance should have been granted. (W. S., 850, §§ 21, 22; McCabe vs. Lecompte, 15 Mo., 78; Rowley vs. Hinds, 50 Mo., 403.)

III. It was error to allow the appeal bond to be read for the purpose of proving the corporate existence of appellant. Because such bond is not evidence thereof; and if it is, it is not the best evidence. (W. S., 288, § 4; 299, § 4; 1 Greenl. Ev., 110 and n.)

E. A. Lewis, for Respondent.

I. There was no error in the court permitting the constable to amend his return conformably to the facts of the service. (W. S., 1034-1035, §§ 3, 6; 1035, §§ 17, 19, 20; Webster vs. Blount, 39 Mo., 500; Corby vs. Burns, 36 Mo., 194; Blaisdell vs. Steamb. Wm. Pope, 19 Mo., 157.

II. Defendant by summoning its witness, and causing the names of its attorneys to be entered on the docket, had given notice to the plaintiff of its intention to try the cause. It was a waiver of plaintiff's formal entry of appearance. (Hammerstein vs. Haase, 47 Mo., 498.)

III. The defendant by appearing to the action was thereby estopped from afterwards denying that it had a legal entity or capacity of being sued, or of appearing in court. But if such proof had been required, the appeal bond was competent as an admission on the record, by the party, of the fact in issue.

NAPTON, Judge, delivered the opinion of the court.

This suit was commenced before a justice of the peace, and was for damages for killing plaintiff's horse. There was a judgment by default rendered by the justice, and that judgment, the defendant moved to set aside, because there was no sufficient service of the writ. The return of the constable, was: "I hereby certify, that I have executed the within writ by reading the same, and delivering a copy of the same to Buckley Levesay, the depot agent at Warrenton, Mo., the 29th July, 1872, in Elkhorn Township, Warren county, Missouri," signed, J. K. Speed, constable.

This motion was overruled by the justice, and the case appealed to the Circuit Court; but the appeal was not taken on the day the judgment was rendered.

When the case was taken up in the Circuit Court, the defendant renewed its motion to dismiss for want of jurisdiction in the justice, and the plaintiff thereupon had leave to amend the constable's return, and insert the words "of the St. Louis, K. C., & N. R. R. Co.," after the words "depot agent," and the motion to dismiss was overruled.

The defendant then moved for a continuance, because the

plaintiff had failed to enter his appearance on the docket before the second day of the term, and this motion was also overruled.

The case was tried, and a verdict and judgment rendered for the value of the horse.

On the trial, the court allowed the plaintiff, in order to establish his allegation that defendant was a corporation, to read the appeal bond as *prima facie* evidence of that fact, in which bond the said defendant was a party by its corporate name, signed by its president and secretary.

We see no objections to the amendment of the return on the writ, allowed in the Circuit Court. That court had the power to do whatever the justice might do. We doubt if any amendment was necessary in this case, since the return implied that the depot agent, on whom it was served, was the agent of defendant. However that may be, the amendment in conformity to the fact was no error. There was no error in allowing the bond of the defendant to be used in evidence to prove its corporate existence.

Under the decision of this court, however, in *Nay vs. Han. & St. Jo. R. R. Co.*, 51 Mo., 505, the appellant had a right to a continuance, as the appellee had failed to enter his appearance on or before the second day of the term. It was held in that case, that, unless by consent of both parties, the case could not be tried at the first term.

The judgment must therefore be reversed and the cause remanded. The other judges concur.

STATE OF MISSOURI, Respondent, *vs.* OWEN HAGAN, Appellant.

1. *Practice, criminal—Evidence—Confessions, when inadmissible.*—The officers of the law went to A. and told him that all they wanted was to recover the goods stolen, and if he would tell them where they were, so that they could get them, that that would be the end of the matter, and nothing further would be done. A. informed them, whereupon he was arrested, and was convicted on this confession. *Held*, that this confession was involuntary, being induced by the flattery of hope and a promise of immunity from prosecution, and was inadmissible in evidence.

Appeal from St. Louis Criminal Court.

R. S. MacDonald, for Appellant.

I. Before a confession of a defendant can be given in evidence against him, it must be shown to be voluntary. (1 Greenl. Ev., §§ 219-22; 1 Phillip's Ev., 449, and cases cited; *Hector vs. State*, 2 Mo., 166; *State vs. Brockman*, 46 Mo., 566, and cases cited.)

II. The officers, who arrested defendant and induced him to confess, were persons in authority, and stood in the same relation to the defendant as the owner of the property or the prosecutor. (1 Greenl. Ev., § 222; *Joy Confess.*, 59, 61; *Rex vs. Parratt*, 4 C. & P., 570.)

WAGNER, Judge, delivered the opinion of the court.

The accused was indicted for grand larceny, and on the trial there was no evidence to convict him of the offense, except his own confessions.

There was an objection made to the introduction of his confessions on the ground that they were not given voluntarily. The court overruled the objection, and admitted them, and this ruling constitutes the only question in the case. The evidence is clear and explicit, that the officers went to the defendant and talked to him a long time in a friendly manner in reference to the taking of the property stolen, and that he denied knowing anything about it. Finally they told him, that all they wanted was to recover the goods, and, if he would tell them where they were so that they could get them, that that would be an end of the matter, and nothing further would be done. Defendant then told what he knew about

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the larceny, and where the stolen articles were. He was then arrested, indicted, and convicted. It is very plain that the confessions were not voluntarily made. They were directly induced by the flattery of hope, and what the prisoner understood to be an assurance of immunity from prosecution in the event that he confessed and told what he knew about the transaction.

They were therefore wrongly admitted in evidence. (*Hector vs. State*, 2 Mo., 166; *State vs. Brockman*, 46 Mo., 566.)

The judgment must be reversed, and the cause remanded. The other judges concur.

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JOHN J. SQUIRES, Plaintiff in Error, *vs.* JOSIAH ANDERSON,
Defendant in Error.

1. *Arbitration and award—How far conclusive.*—The award of arbitrators is conclusive as to all matters within the scope of the authority given them in the submission, but if they assume to act on questions not submitted, or fail to follow the directions in the submission in a material point, their award, in reference to such matters, will not be binding either on questions of law or fact.
2. *Arbitration, submission to—Construction of—Permanent improvements—Vines.*—A. and B. were partners in business, A. furnishing the land to be cultivated and the money necessary, B. furnishing his labor. By the terms of a submission to arbitration between them, in order to settle up the partnership, A. was to be charged for all permanent improvements made on his land by the firm. *Held*, that the increased value of vines, due to their growth during the existence of the partnership, which were growing on the farm before the partnership was formed, was not chargeable against him as permanent improvements made by the firm.

Error to Jefferson Circuit Court.

Jno. L. Thomas & Bro., for Plaintiff in Error.

I. If the arbitrators acted within the scope of their authority in this case, there being no allegation or proof of fraud, misconduct, accident or mistake on their part, the award is conclusive upon the parties.

II. They found that the increased value of the vines in dispute was a permanent improvement. The arbitrators were the final judges of both the law and the facts. (Morse Arbit., 214-220, 292, and cases cited; 316; Boston Water Power vs. Gray, 6 Met. (Mass.), 131; Valle vs. N. Mo. R. R. Co., 37 Mo., 445.)

Jos. J. Williams, for Defendant in Error.

I. An award is of no force at all upon any matters not embraced in the submission, and submitted to the arbitrators for their decision. (Allen vs. Galpin, 9 Barb., 246; Pratt vs. Hackett, 6 Johns., 14; Morse Arbit., 259, 260, 261; Tudor vs. Scovell, 20 N. H., 174; Bonner vs. Charlton, 5 East, 139.)

II. The construction of the award, submission, &c., belongs to the court when suit is brought to enforce the award, and if the court can see that the arbitrators have awarded upon any matter not in the contemplation of the parties, their action to that extent at least, will be held void. (Kanouse vs. Kanouse, 36 Ill., 439; Bonner vs. Charlton, 5 East, 139.)

VORIES, Judge, delivered the opinion of the court.

This action was brought to recover the amount of an award made against the defendant by arbitrators chosen by the parties.

It appears by the record, that the plaintiff and defendant, in the spring of 1869, entered into partnership for the purpose of conducting the business of farming, gardening and fruit growing, and in the manufacturing and sale of farm, garden and orchard products. The business was to be conducted on the farm owned by defendant, adjoining the town of De Soto in Jefferson county, except the sale of the products was to be made in the most suitable market. The terms of the partnership were, that defendant agreed to furnish all the capital necessary to carry on the business, and to be cashier of the firm; that regular accounts were to be kept of the business; that the plaintiff agreed to give his labor,

time and best efforts, and undivided attention, to the business, and he was to have the control and management thereof, subject to the views of both parties, and was to reside on the farm without rent, and the profits were to be shared between them. In November, 1871, the parties attempted to dissolve their partnership and settle up their business, when differences arose between them in reference to the settlement, when, to adjust and settle the matters of difference, they submitted the matters in difference, by a submission in writing, to three referees or arbitrators, whose award was to be final between them. The written submission, in defining the powers of the arbitrators and directing their action in the premises, was in the following:

"The said persons, so selected as aforesaid, to act in the premises as referees and arbitrators between the said Anderson and the said Squires—and in proceeding to ascertain said balances, they are to be guided by the following principles or rules of ascertainment and decision, viz:

"First—To make a correct inventory of all the stock and property now owned by said firm, including its assets of every description, and ascertain the true balance in favor of said firm.

"Second—State the account of said firm with the said Anderson, crediting him therein with all monies advanced by him to said firm, and also with the value in wages of all labor furnished the firm by him; and debiting him with the amount, at selling rates, of goods furnished him by the firm, and with the amount obtained by him for goods of the firm sold by him, and also all amounts of money drawn by him from the firm, and with the present value of all permanent improvements made by the firm.

"Third—State the account of said firm with said Squires, crediting him with all monies advanced by him to it, or laid out by him on its account, and with all labor (his own excepted) furnished by him, and, if he boarded any hands for the firm, with the reasonable charges for such board; debiting him with all goods of the firm, at market prices, furnished

to him by the firm, and with all monies obtained by him for goods sold.

"Fourth—State the account between the said Anderson and the said Squires, showing the true balance between them."

The submission then provides, that, if any profits are shown to exist, they are to be divided equally between the parties, and provides for the manner of the distribution.

The defendant in his answer avers, that the arbitrators in making their award transcended the authority given them, in this; that they were authorized by the submission, among other things, to state an account between the defendant and the firm, in which the defendant, among other things authorized to be charged against him, was to be charged with the present value of all permanent improvements made by the firm, and that under this provision the arbitrators charged against the defendant over nine hundred dollars for the estimated improved value of grape vines growing on the farm, which were standing and growing on the farm at the time of the formation of the partnership; which improved value of the vines, already growing on defendant's farm at and before the partnership, by their natural growth while being cultivated by the partnership for the purpose of marketing or making profit from the fruit grown, the defendant insists is not comprehended in, or contemplated by, the term permanent improvements made by the firm.

The plaintiff in his replication insisted, that the estimated increased value of the vines was properly included in the charges made against defendant, and that said estimate was authorized by the clause in the submission before referred to.

The case was tried by the court. The evidence shows, that the vines were estimated as charged in the defendant's answer. At the close of the evidence, the court declared the law to be, that the improved value of the grape vines, standing and growing on the defendant's land at and before the formation of the partnership, could not properly be charged against defendant under the power given to the arbitrators

to estimate the present value of permanent improvements made by the firm. The plaintiff objected to this declaration of law, and, his objection being overruled, he excepted.

Judgment was then rendered in favor of the defendant. The plaintiff filed his motion for a new trial, which being overruled he excepted, and has brought the case here by writ of error.

The only question, presented by the parties for the consideration of this court, is whether the arbitrators, under the powers and directions given them by the submission, had the power or right, in estimating and stating the account between the plaintiff and partnership, to estimate, as permanent improvements made by the firm, the increased value of grape vines which were growing on the farm when the partnership was entered into. It is insisted by the plaintiff, that the arbitrators had full power to judge and decide both as to the law and the facts of the case, and that their award is final and conclusive on the parties. This may be, and is true, in reference to matters coming within the scope of the authority given them by the submission. But if they assume to act on questions not submitted, or fail to follow the directions in the submission in a material point, their award in reference to such matters will not be binding, either on questions of law or of fact. (*Morse Arbit.*, 181, 259, 293; *Valle vs. N. Mo. R. R. Co.*, 37 Mo., 445; *Boston Water Power Co.*, 6 Met. (Mass.), 131; *Pratt vs. Hacket*, 6 John., 14; *Allen vs. Galpin*, 9 Barb., 246.)

Whether the arbitrators had authority to act in reference to any particular subject matter, or whether their award conforms to the directions and powers given them by the submission, and the proper construction to be given to the award when made, are questions to be decided by the courts; and in construing either the terms of the submission, or the language of the award, they should be construed with reference to, and in the view of, all the surrounding facts in the case. (*Kanouse vs. Kanouse*, 36 Ill., 439.)

The controversy in this case grows out of the construction

given to certain language used in the articles of submission. The arbitrators are authorized, in stating the account between defendant and the partnership firm, among other things, to charge him with the present value of all permanent improvements made by the firm. The arbitrators under this provision charged the defendant with the estimated improved value of grape vines planted by defendant, and which were growing on the farm at and before the formation of the partnership. The question is, was this estimated improved value of the vines properly comprehended in the language—permanent improvements by the firm? It will be recollected, that by the terms of the partnership the defendant furnished his fruit farm and all of the capital necessary to carry on the business, which may be considered his capital in the firm. The defendant on his part furnished his labor; he agreed to give his entire labor and undivided attention to the business; this labor and attention represented his capital in the partnership; the business of the firm was to cultivate the farm and market fruit, vegetables, and other products, for their joint profit, one furnishing the farm and money necessary, and the other furnishing his own labor and attention. The grape vines were growing on the farm at the time of the contract. When they undertook to dissolve the partnership, they disagreed about their accounts, and agreed to submit their differences to arbitrators for their decision or award. In their submission they gave the arbitrators specific directions as to the manner of making up the several accounts provided for, and the particular subjects and matters to be considered by them in making up the accounts. In making up the account between plaintiff and the firm, they were directed to allow him for all monies advanced by him to the firm, and for all "labor (his own excepted), furnished by him, and, if he boarded hands for the firm, with the reasonable charges for such board," &c. It will be seen by this provision, that they recognized the fact, that the plaintiff had agreed to furnish his own labor as a means of becoming a partner in the profits, which was his part of the capital, and to be performed by

him as a consideration for the capital furnished by the defendant. In stating the defendant's account the arbitrators were authorized, among other things, to charge him with whatever goods he had obtained and used, which had belonged to the firm, and with the present value of all permanent improvements made by the firm. It is contended by the plaintiff, that his labor in cultivating the vines had made them grow and become more valuable, and that their increased value was a permanent improvement within the meaning of the submission; but it must be recollected, that by the partnership agreement he had agreed to furnish his own labor in cultivating the farm for a share in the profits resulting from the fruit and other produce raised on the farm, and the arbitrators were directed to allow him in the account for all labor furnished by him except his own. With all these facts in view are we to believe, that the parties intended, by the language used, to include the incidental growth of the vines, and their increased value thereby, in the terms—permanent improvements made by the firm? I cannot believe it. The natural construction of the language, particularly when we take the other facts in the case into consideration, is, that by the language used the parties only contemplated the erection of fences, the planting of new vineyards or orchards, the erection of buildings, &c., &c., all of which the plaintiff was allowed for by the arbitrators. The amount estimated by the arbitrators for the increased value of these vines being more than the whole award made in plaintiff's favor, the judgment was properly rendered for the defendant.

The other judges concurring, the judgment is affirmed.

Lewis v. Williams, Adm'r of Henry.

F. R. LEWIS, Plaintiff in Error, *vs.* M. F. WILLIAMS, ADMINISTRATOR OF GEORGE HENRY, deceased, Defendant in Error.

1. *Administrators—Final settlement—When set aside.*—A final settlement, made by an administrator, has the force and effect of a judgment, and can only be set aside or overcome on the ground that it was fraudulently procured; mere illegal allowances, unless obtained by fraud, are no ground for impeaching or setting it aside.

Error to Washington Circuit Court.

P. Pipkin, for Plaintiff in Error.

I. In equity an administrator's settlements may be set aside for fraud. It is not necessary that fraud in fact, should be proven. It is sufficient if the act of the administrator operates in law to defraud. (Sto. Eq. Pl., § 187; Clyce vs. Anderson, 49 Mo., 37.)

Reynolds & Relfe, for Defendant in Error.

I. No fraud whatever is shown, either actual or constructive. Without that, plaintiff cannot recover. (Jones vs. Brinker, 20 Mo., 87; Mitchell vs. Williams, 27 Mo., 399; Picot vs. Bates, 47 Mo., 390; Clyce vs. Anderson, 49 Mo., 37.)

WAGNER, Judge, delivered the opinion of the court.

Plaintiff brought his suit against the defendant to falsify and set aside the final and other settlements made by the defendant as administrator of the estate of one Henry, deceased. The charges in the petition were, that the administrator procured false and fraudulent allowances to be made in his favor in his annual and final settlements; that he fraudulently and wrongfully paid, out of the assets of the estate, debts allowed in the fifth class, and left debts which were of the first class unpaid, and that the estate was insolvent. Upon the trial no evidence whatever was given of any actual fraudulent intent or design upon the part of the administrator.

The case showed, that plaintiff had an allowance which was placed in the first class of demands against the estate, that the administrator paid a part of the demand, and that at the final settlement the administrator was credited with two

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claims which were of the fifth class, and that the estate was insolvent, and that the plaintiff did not receive full payment on his claim. Upon this evidence the court gave judgment for the defendant.

A final settlement, made by an administrator, has the force and effect of a judgment, and can only be set aside or overcome on the ground that it was fraudulently procured. (*Jones vs. Brinker*, 20 Mo., 87; *Mitchell vs. Williams*, 27 Mo., 399; *Picot vs. Bates*, 47 Mo., 390; *State vs. Rowland*, 23 Mo., 95.) Mere illegal allowances, unless it be found that they were obtained by fraud, will be no ground for impeaching the judgment and setting it aside.

In the present case there was neither omission nor concealment. The court improperly allowed the defendant credits for payments in the fifth class, when the first class was not fully paid up. But this was a mere mistake of law, and does not appear to have been attended with any circumstances of fraud.

We do not understand the case of *Clyce vs. Anderson*, 49 Mo., 37, as in any way impairing or modifying the established doctrine in this State.

Under the peculiar circumstances of that case, it was considered, that the omission of the executor operated as a constructive fraud and would therefore justify the interference of this court. There is no such state of facts presented here.

We think the judgment should be affirmed. The other judges concur, except Judge Adams, who is absent.

MICHAEL BOLY, Respondent, *vs.* ANTON LAKE, Appellant.

1. *Practice, civil—Trial—Evidence—Unstamped agreements.*—A written agreement, not stamped as the law requires, is admissible in evidence upon a stamp being affixed and cancelled.

Appeal from Jefferson Circuit Court.

John L. Thomas & Bro. for Appellant.

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I. The contract, offered in evidence by plaintiff, was not admissible, not being stamped according to law. The contract by act of congress is invalid. (Bump Int. Rev. Laws, 313, § 158, and note *a*.)

II. Even if the respondent had a right to put a stamp on at the trial, he could only do so upon proof, that either the stamp was forgotten at the time, or for some other reason it was omitted with no fraudulent intent. (Whitehill vs. Shickle, 43 Mo., 537.)

Jos. J. Williams, for Respondent.

I. The plaintiff was properly permitted at the trial to stamp the contract offered in evidence by him. (Boehne vs. Murphy, 46 Mo., 57.)

NAPTON, Judge, delivered the opinion of the court

This was a suit originating before a justice of the peace to recover \$ 60, due on a contract to dig a well, in which the contractor agreed to get water for \$ 50 in dirt, and two and one half dollars per foot for blasting, and if no water was obtained there was to be no pay.

The issue, as to whether water was obtained, was submitted to the jury, and found for plaintiff, both before the justice and in the Circuit Court.

The instructions asked by defendant were all given.

The only point in the case is, that a written agreement, which was not stamped as the law required, was allowed to go in evidence upon a stamp being affixed and cancelled.

Upon the authority of Whitehill vs. Shickle, 43 Mo., 537, and Boehne vs. Murphy, 46 Mo., 57, the judgment is affirmed.

The other judges concur.

THE STATE OF MISSOURI *ex rel.*, ELIJAH ROBINSON PROSECUTING ATTORNEY FOR PIKE COUNTY, MISSOURI, Appellant,
vs. JAMES A. SANDERSON, COLLECTOR FOR SAID COUNTY, Respondent.

1. *Practice, civil—Parties—Persons in interest.*—Courts are not organized to decide abstract propositions of law, and the persons in interest must be brought before the court.
2. *Railroads, subscription to—Bonds, taxes to pay interest on—County Court—Railroad—The State as plaintiff.*—In a suit to enjoin the collector from collecting taxes levied to pay the interest on bonds (alleged to be illegal) issued to a railroad, the County Court, who issued the bonds and levied the tax, and the railroad, should be made parties thereto. The State through its proper officers can bring such suits.

Appeal from Pike Circuit Court.

Elijah Robinson, for Appellant.

I. The bonds were illegally issued, and were void. The law required that the election should be conducted in accordance with the law controlling general and special elections, then in force. (Sess. Acts 1868, p. 92, § 1.) The election was not so conducted. 1st. The order for an election undertook to prescribe qualifications for voters, contrary to, and in direct violation of, the constitution of the State. (Art. 2, Const. §§ 3, 15, 16, 17, 18.) 2nd. The order for an election did not direct that any notice should be given, and no notice of the election was in fact given. (*McPike vs. Pen*, 51 Mo., 63.) 3rd. No special registration was held prior to the election to ascertain who should be entitled to vote. (44 Mo., 346; Sess. Acts 1868, p. 136, § 18.) 4th. The election was fraudulently conducted, and illegal votes were cast and received. 5th. Two-thirds of the qualified voters voting at said election did not vote in favor of making the subscription. (Sess. Acts 1868, p. 92, § 1; Const. Art. 11, § 14.) The power to subscribe was a statutory power; and could be acquired only by a strict compliance with the terms of the statute. (*Stines vs. Franklin county*, 48 Mo., 167; *City of St. Louis vs. Alexander*, 23 Mo., 483; *State vs. Saline County Court*, 45 Mo., 242; *Leav-*

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enworth & D. M. R. R. Co. vs. Platte County Court, 42 Mo., 171; State vs. Clark County Court, 41 Mo., 44; Fowler vs. St. Joseph, 37 Mo., 228; Walcott vs. Lawrence Co., 26 Mo., 272; Starin vs. Town of Genoa, 23 N. Y., 439; Gould vs. Town of Sterling, *Id.*, 456; Dillon Mun. Cor. § 108 and cases cited.)

They would be void into whosoever hands they might come because the power to issue them had not been conferred upon the County Court. (Stines vs. Franklin county, 48 Mo., 167; Carpenter vs. The Town of Lathrop, 51 Mo., 483; Dill. Mun. Cor., §§ 424, 425, 426, and cases cited.) The County Court only possessed the power to initiate the proceedings by which the power to make subscriptions and issue bonds might be called forth,—that is to order an election. The power rests in the qualified voters, and in this case they did not, and under the order of the court could not have conferred the power, because they were not called upon to do so. The court, not having the power, should have asked the qualified voters to confer it, but, instead of doing so, they directed the order for an election to another class of persons—to a class possessing certain qualifications fixed by the court and not by the law.

II. The suit was properly brought. It is competent for the State, through its authorized officers, to institute this proceeding to restrain a public officer from collecting a tax which has been levied in violation of the constitution and laws of the State. (State vs. Saline County Court, 51 Mo., 350, and numerous cases there cited; High Injunc. § 747.)

III. The collector was the only necessary party defendant to this suit. He alone was undertaking to collect this tax, and his acts were alone immediately feared, and sought to be enjoined. No person else was doing or threatening to do any thing; and it would have been useless to have made parties defendants to the suit, whose acts were not complained of, and who were doing nothing which plaintiff sought to enjoin.

Fagg & Dyer, for Respondent.

I. The State of Missouri has no interest whatever either directly or indirectly in the result of the litigation, and this action cannot be maintained in the name of the State. (State vs. Parkville & Grand R. R. R., 32 Mo., 496; Sayre vs. Tompkins, 23 Mo., 443; State vs. Saline county, 51 Mo., 350, and cases cited.) This is not a proceeding by the State against either a public or private corporation, but it is against an individual simply.

II. The railroad company, as well as the County Court of Pike county, was a necessary party to the suit. (State vs. Callaway county, 51 Mo., 395.)

NAPTON, Judge, delivered the opinion of the court.

This is an application to the Circuit Court of Pike county to issue an injunction against Sanderson, the collector, prohibiting him from collecting certain taxes levied by the County Court to pay the interest on certain bonds issued by that Court on a subscription of \$100,000 to the Clarksville & Weston R. R. Co. The suit is by the State through the circuit attorney.

The grounds, upon which the injunction is asked, are that the election, held under the order of court, upon the question of subscribing to the R. R. Co., was illegal, inasmuch as it allowed disqualified persons to vote, and disregarded the provisions of the second article of our constitution, and that, notwithstanding this illegal election, the court did subscribe \$100,000 to the stock of the company, and issued bonds to pay this subscription, and levied a tax to pay them on the property of citizens of the township, where the vote was taken.

It is asked that the collection of this tax be prohibited or enjoined. A temporary injunction was granted, but, upon a motion to dissolve the bill, was dismissed.

The objections to this petition are, that the State is not a proper party, and that neither the County Court, who issued the bonds, nor the R. R. Co., to whom they were issued, were made defendants.

We do not question the right of the State through its proper officers to institute such a proceeding; but the County Court, who subscribed to the R. R. Co., and levied a tax to pay the bonds issued, ought to be heard, and the Railroad Company, to whom the bonds were issued and in whose possession they may be presumed to remain, ought to be heard. Neither are made parties defendant.

Courts are not organized to decide abstract propositions. The parties interested in the decision of the cause must be before the court on one side or the other.

In the Saline county case (51 Mo., 350) the County Court the clerk, and collector, were all made parties defendant. The main object of the bill in that case was to prevent the issue of bonds, and the point examined and decided was as to the validity of the subscription, and the result was the prevention of any further issue of bonds; the previous issue having been so inconsiderable as to elicit no attention on either side.

In this case the suit is not brought to restrain the issue of the bonds, and if it was, it would be clear that the County Court should be a party; but it is brought to prevent the collector from collecting a tax levied by the court, and which he is bound to collect by virtue of the obligations of his office.

The tax is said to be illegal, but the court, which ordered it, is not made a party defendant.

We may observe, that the irregularities set up in regard to the election would be no defense against the *bona fide* bondholders.

Judgment affirmed. The other judges concur.

Rubey v. Shain, et al.

WEB M. RUBEY, Respondent, vs. ED. C. SHAIN, et al., Appellants.

1. *County Court—Railroads—Subscription before articles filed—Collector, action against.*—A subscription of stock ordered by a County Court to a Railroad Company, before its articles of association have been executed or filed with the Secretary of State, is illegal and void. But where the County Court orders the levy of a tax to meet the subscription, and the collector proceeds to enforce its collection, a tax-payer cannot have his action to recover back the amount so collected from him. His remedy is by proceeding to arrest the execution of such illegal subscription, and the State may, through her legal representatives, arrest the issue of the bonds.

Appeal from Macon Circuit Court.

W. H. Sears, for Appellants.

I. The stock having been voted for by the requisite number of resident tax-payers of said Hudson Township, they knowing the objects and purposes of the road, and the bonds having been issued to said road, for the payment of said stock by the County Court, the authorized agents of said township for that purpose; and it not appearing but that these bonds have got into the hands of innocent purchasers, it would be imposing a hardship on those purchasers, that the law does not sanction, if this action be sustained. (Knox County vs. Aspinwall, 21 How., 539; Flaggs vs. City of Palmyra, 33 Mo., 440.)

II. The tax lists showed that the property of the respondent was subject to taxation, and therefore the collector was justified in collecting the tax due. (37 Mo., 280; 47 Mo., 466.)

W. C. M. Rubey, for Respondent.

I. When the County Court attempted to make the so-called subscription, nothing had been done towards forming a corporation, excepting the drafting of Articles, and the subscriptions thereto, by eight persons of \$200.00 each, making in all sixteen hundred dollars, which was wholly inadequate, (W. S., 296-9, §§ 1, 3) and was void.

NAPTON, Judge, delivered the opinion of the court

This was a suit against the collector of Macon County and his sureties to recover back a tax of fifty dollars paid by

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plaintiff on an assessment against his property levied by the County Court, to pay a subscription or interest on a subscription to the St. Louis, Macon & Omaha Air Line R. R. Co. The facts in the case, about which there was no controversy, are these: On the 16th day of December 1868, articles of association, proposing to build a road about ninety miles in length, were signed by eight persons, each subscribing two hundred dollars, forming what was called the St. Louis, Macon & Omaha A. L. R. R. Co.

On the 18th day of the same month, a petition was presented to the County Court, under the act of the 23rd of March 1868, signed by the necessary number of tax-payers of Hudson township, requesting the court to order a vote in said township, as to whether the township would take \$40 000 of stock in said company. In June 1869, the vote was taken and the requisite majority was obtained. On the 9th of November 1869, the County Court ordered the subscription, and issued bonds therefor, and in 1871 made a levy of 25 cents on each hundred dollars' worth of property in said township, to pay the interest accrued, and said levy was duly entered on the tax books for the year 1871, and defendant Shain collected the same against the protest of plaintiff.

The articles of association were not executed until the 10th of Nov. 1869, and not filed with the Secretary of State till the 12th of the same month and year. On this state of facts the question is, whether such subscription is valid.

The Constitution (Art. II, Sec. 14) says: "The General Assembly shall not authorize any county, city or town, to become a stock holder in or loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein shall assent thereto."

The statute (W. S., 305, § 17) says, "it shall be lawful for the County Court of any county, the City Council of any city or the trustees of any incorporated town, to take stock for such county, city or town, or loan its credit to any railroad company, *duly organized under this or any other law of the State; provided, &c.*"

The act of 1868, under which the subscription was made, provided that "Whenever twenty-five persons tax-payers and residents in any municipal township for election purposes, in any county of this State, shall petition the County Court of such county setting forth their desire as a township to subscribe to the capital stock of any railroad company in this State, building or proposing to build a railroad into, through or near such township," &c., "a vote shall be ordered," &c."

The company was incorporated under the general law.

That law (W. S., 296, § 1) provided, that five persons or more might make and sign articles of association, in which shall be stated the name of the company, its proposed duration, the points of beginning and ending of the road, its length and the counties through which it was to run, the amount of capital stock, which should not be less than \$10-000 for every mile of road constructed or proposed to be constructed. This section then declares that on compliance with the provisions of the third section of the same chapter these articles might be filed in the office of Secretary of State, who was to indorse thereon, the day they were filed, and record them, and *thereupon* the persons named *should be a corporation, &c.*

The third section of the act above referred to prohibited the filing and recording of these articles, until one thousand dollars of stock was subscribed for every mile of road proposed and five per cent. paid thereon in good faith and in cash, and an affidavit was annexed to said articles by three directors to this effect, and that it was intended in good faith to construct and operate the road.

The constitution does not seem to prohibit the legislature from authorizing municipalities to subscribe to corporations *in fieri*, or contemplated ones, since it uses the terms "company, association or corporation," and the word association might well apply to an unincorporated company.

But in regard to railroads the legislature uses more definite language, and undoubtedly limits the power to subscribe to "railroad companies duly organized under some law of the

State," general or special, and the act authorizing township subscription is confined to assistance to some railroad company in this State, and does not in terms authorize a subscription to a mere contemplated corporation.

It is not intended that counties, cities or towns or townships, shall by their subscriptions form the basis on which a future corporation is to be erected—a nucleus around which aid is to be gathered from other quarters to construct roads; but that they may by their subscriptions or loans aid corporations already in existence.

In the case now before the court it will be seen from the statement that this St. Louis, Macon & Omaha Air Line Company had no existence until the 12th of November 1869, that some eight subscribers had formed an association in 1868, in which they agreed to advance altogether sixteen hundred dollars towards this enterprise, but that the articles were never filed in the office of Secretary of State until the 12th of November 1869, for the obvious reason that the stock subscribed was insufficient to meet the requirements of the law. In the mean time and immediately after the first step in the enterprise was taken, the County Court, at the instance of certain tax-payers, ordered a vote in Hudson Township, and the result of that vote being favorable, the court proceeded to subscribe the stock voted on the 9th of November 1869, and on the same day issued the bonds, and on this stock thus subscribed, and that of another township, the three directors proceeded to Jefferson City and filed the articles of association and made the necessary affidavit. In this way the ninety thousand dollars essential to the formation of the corporation, the road being ninety miles long, was raised, and so in fact the two townships and the eight subscribers of two hundred dollars each started the company. This was all done no doubt in good faith, and there is no reason to believe that any evasion of the law was intended; but however unpleasant the duty may be and however disastrous may be the consequences to innocent persons, we are obliged to hold the subscription of the court illegal and void. For it is well settled

that these municipalities cannot subscribe to railroad enterprises unless authorized by law, and the law in this case gave them *no power* to subscribe stock to a corporation which had no existence, and which could only spring into existence by virtue of the stock subscribed.

But the liability of the collector for collecting this tax thus illegally levied by the County Court, presents a more difficult question. To hold a subordinate, ministerial officer responsible for the erroneous opinions and judgments of the judicial tribunal under whose mandate he acts, is not consistent with our views of justice, public policy or expediency. Preventive remedies should be favored, but punitive judgments against innocent parties should not be encouraged. The decisions of this court do not indicate any well defined rules on this subject, though it has been examined in various cases. (*Hannibal & St. Joe R. R. vs. Shacklett*, 30 Mo., 550; *State vs. Shacklett*, 30 Mo., 280; *Glasgow vs. Rowse*, 43 Mo., 479; *St. Louis B. & S. Ass'n vs. Lightner*, 42 Mo., 421; *St. Louis Mut. Life Ins. Co. vs. Charles*, 47 Mo., 462; *State vs. Dulle*, 48 Mo., 282; *N. M. R. R. Co. vs. Maguire*, 49 Mo., 482.)

The inclination of the court has been, as appears from these decisions, to hold the collector exonerated when the property was liable to taxation and the assessor's book, superintended and sanctioned by the County Court, ordered the collection of the tax. The collector, like the sheriff, in executing a writ is not bound to examine into the legality of the assessment which had been passed upon and determined by the tribunal authorized to examine such questions, and supposed to be competent to decide on them.

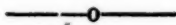
He is merely authorized to do what he is ordered to do by his superiors. It may be asked then, what is the remedy in cases where the assessment is illegal, or rather where it is based on an illegal act of the County Court? The answer is that the tax-payer, according to the decision of this court in the case of *Newmeyer vs. the Mo. & Miss. R. R. Co.*, 52 Mo., 81, may arrest the execution of an illegal subscription or other order of the County Court, and as held in the *Saline*

Hoelscher v. St. L., K. C. & N. R. R. Co.

Co. Case (51 Mo., 350) that the State may through her legal representatives arrest the issue of such bonds.

In the case of the State vs. Sanderson, *ante* p. 203, we have maintained the same position. It is true that no redress has been indicated where the illegal tax has been paid, but would it not be more in accordance with justice and the principles of law, that several hundred or several thousand people, not one of whom ventures to ask the interposition of a court before the collector came around, should suffer the loss of an inconsiderable sum, than that the officer to whom is intrusted the collection of revenue should be compelled to refund to the hundreds or thousands from whom he has collected a tax, the aggregate sum collected on an illegal assessment.

The judgment is reversed on the ground that the collector is not liable. The other judges concur.



FRANK HOELSCHER, Respondent, *vs.* ST. LOUIS, KANSAS CITY
AND NORTHERN RAILWAY COMPANY, Appellant.

1. Transier vs. St. Louis, K. C. & N. R. R. Co., *ante* p. 189, affirmed.

Appeal from Warren Circuit Court.

John M. Woodson, for Appellant.

E. A. Lewis, for Respondent.

[See briefs of the attorneys in Transier vs. St. Louis, K. C. & N. R. R. Co., *ante* p. 189.]

NAPTON, Judge delivered the opinion of the court.

This case is precisely like the case of Transier vs. St. Louis, Kansas City & Northern Railway Company, and for the same reason must be reversed and remanded.

TILLMAN C. WILSON AND DON E. WILSON, by their next friend,
FULLERTON A. GROVE, Appellants, *vs.* NAPOLEON WILSON,
Respondent.

1. *Administrators—Acts done before appointment—Innocent parties.*—Acts done by an administrator, prior to his appointment will be validated by his subsequent appointment, except where the rights of innocent parties intervene.
2. *Executors—Deed—Subsequent probate of will.*—A will giving power of sale vests the title in the executor at the time of the testator's death, and his deed of the property, made before probate of the will, is a good conveyance, provided the will be subsequently probated.

Appeal from Adair Circuit Court.

Ellison and Ellison, for Appellants.

I. The action of the Probate Court in revoking the letters of administration, and granting letters testamentary, was a nullity, so far as the granting letters testamentary. It had power to revoke letters of administration, but none to grant letters testamentary without probating the will that stood upon its record as rejected.

II. When the widow received her letters from the Circuit Court, she had renounced the provisions of the will made for her benefit, rejected its provisions, and elected to be endowed under § 11 (W. S., 540). She must accept the will as she finds it, its burdens and benefits alike; and if she rejects its provisions for her, she cannot convey as executrix without an order of court.

III. The bequest is made to her in consideration of her accepting the will, and in lieu of dower. The title to all the land, including this in question, became the appellants upon the decease of the widow.

Greenwood & Pickler, for Respondent.

I. The will gave the land to the widow. She could have conveyed as owner, if the will were never probated; when the will was probated, the letters related back to all her subsequent acts under the will, or in attempting to act under it, and they were legalized (47 Mo., 500.) She had power to convey as owner and as executrix.

II. If after it was probated, she elected one-half, and rejected

the provisions of the will, it would not invalidate the deed to respondent, who could not enforce upon her an acceptance of the will. (47 Mo., 247 and cases cited.)

III. She could reject the provisions of the will in her favor, and retain her power to sell under the will.

NAPTON, Judge, delivered the opinion of the court.

This was an action of ejectment. The plaintiffs gave in evidence the will of their grandfather, which authorized his widow to sell the real estate in controversy; and this will was ordered to be filed for record and a certificate to be granted. This was in Feb'y, 1867.

On the same day a motion was made by the widow of the testator and his son, now defendant, for a new hearing, and it was granted, and the order establishing the will was set aside. Subsequently at the same term the will was rejected, and an order was made that a certificate of rejection be entered. At the same term Mary Ann Wilson, the widow, is appointed administratrix.

In April, 1867, Mary Ann Wilson files her election for dower, and prays the appointment of commissioners; and commissioners were appointed. In Nov., 1867, there appears an order stating, that Mary Ann Wilson, executrix of the last will of Tho. C. Wilson, prays for letters testamentary, and as it appeared to the court, that the said will had been proved and entered of record, it was therefore ordered that the letters of administration be revoked, and letters testamentary were granted.

It appears, that on the 30th Jan'y, 1868, Mary A. Wilson, executrix, executed a deed for the land in controversy to defendant. To the introduction of this deed it was objected that she had no power to make such a deed. A proceeding in the Circuit Court was then read in evidence. This was a petition on the part of Napoleon Wilson, on his own account, and as next friend of J. C. Wilson and E. Wilson, his sons, against Mary Ann Wilson and the County of Adair, and the object was to establish the will. This was at the Dec. Term, 1868; the result was, that the will was established and probated Jan'y

4, 1869. There was then a petition to assign dower at the Dec. Term, 1868; and in Jan'y, 1869, dower was assigned to the widow.

In April 1867, Mrs Wilson had renounced the will, and elected to take dower under the 11th Sec. of Rev. Stat., 1865, concerning Dower.

The court declared the law to be, that the deed of Mary A. Wilson in 1868, under the power given in the will, probated by the Circuit Court in 1869, was valid and conveyed the premises. And this presents the only question in the case. At the time the deed was made, the will, under which she assumed to act, was not probated; though subsequently it was, and the question is, "if the subsequent probate by the Circuit Court related back to the time of executing the deed, and made it valid."

There is no dispute in the case, that the will conveyed the property to Mary Ann Wilson during her life, and authorized her to control it in any way, and especially to sell, lease, rent, mortgage or otherwise dispose of it.

One clause of the will is as follows: "I hereby authorize and empower my beloved wife, Mary Ann Wilson, whenever she thinks it for the interest of the estate to do so, to sell a part or the whole of the real estate, and to invest the proceeds in part or in whole in good interest bearing promissory notes, United States bonds, or other safe securities; and all the acts of my said wife, Mary Ann Wilson, done in conformity with the authority herein conferred, shall be invested with, and possessed of, the same binding force and legality in both law and equity, that they would have, had they been executed by myself in my life time."

There is a difference between an executor and an administrator. The latter derives his power from the appointment by the Probate Court, and of course has no power until so appointed. The executor derives his power from the will, and the property vests in him from the moment of the testator's death. (Abbott, C. J. in Woolley, Ex. vs. Clark, 5 B. & A., 744.)

Therefore, where a demise by an executor, the lessor of plaintiff in ejectment, was laid two years before the will was proved

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under which he claimed, it was held good. (*Roe vs. Summersett*, 2. W. Black., 692.)

Judge Redfield observes in his work on Administrators, that the distinction is not now practically of much importance; because, he regards it as well settled, that even in cases of administrators the title and right of the administrator after his appointment relates back to the death of the intestate. This doctrine of relation is a fiction of law to prevent injustice, and the occurrence of injuries where otherwise there would be no remedy, and would not be applied in cases where the rights of innocent parties intervened.

In the case now under consideration, Mrs. Wilson had under the will a right to convey all or any part of the real estate. At the date of the deed, the will was not probated. Subsequently the will was established and proved in accordance with the law. Of course her power to convey was derived from the will, and if the will had been set aside, her deed would have been ineffectual; but the will was subsequently established, and, when established, it of course operated as a will and spoke from the moment of the testator's death.

The doctrine of relation therefore is not necessary in this case. The will spoke from the testator's death. The power of the executor existed then. That this will remained without probate for several years is immaterial, provided it was ultimately established.

The judgment is affirmed. The other judges concur.

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STATE OF MISSOURI, *ex rel.*, CHARLES A. PERRY, *et al.*, Relators,
vs. GEORGE B. CLARK, STATE AUDITOR, Respondent.

1. *Mandamus*—State Auditor—Lessees of Penitentiary—Labor of convicts—Acts of March 20th and 22nd, 1873.—The Acts of March 20th and 22nd, 1873, are *in pari materia*, and must be construed together, and under them the lessees of the penitentiary are entitled to pay for convict labor on the Capitol grounds and to the State Auditor's warrant therefor.

State ex rel. v. Clark, State Auditor.

Petition for Mandamus.

Sharp & Broadhead, for Relators.

I. The two acts are *in pari materia*, and passed at the same session of the legislature, and approved within two days of each other, and ought to be construed together.

H. Clay Ewing, Atty. General, for Respondent.

I. On the 20th of March, 1873, the convict labor belonged to the State, and the 3rd and 4th Sections of the act of that date show, that the convict labor authorized by that act was in addition to the \$10,000 appropriation, and not intended to come out of it.

II. Section 8 of the Act of March, 22nd, 1873, provides, that all personal property, belonging to the State in and about the penitentiary, shall be sold to the lessees, and payment shall be made within one year, either in cash or in the labor of said convicts.

WAGNER, Judge, delivered the opinion of the court

This is an application on the part of the relators, asking for a peremptory writ to require the auditor to draw his warrant in their favor for the sum of three thousand three hundred and twenty-one dollars and seventy-five cents, being the amount claimed for convict labor furnished by them for work on the fencing of the Capitol ground.

The return denies, that plaintiffs are entitled to a warrant under the law, and also sets up the additional defense, that the relators are indebted to the State and therefore should not have the warrant drawn in their favor.

In regard to this latter defense, however, there is a stipulation filed, signed by both parties, to the effect that a construction of the law is desired, and that, if the court be of the opinion that there is a liability against the State in relators' favor, then the writ prayed for may issue. By an act approved, March 20, 1873 (Sess. Acts 1873, p. 11,) entitled "An act to provide for the completion of the fence around the

Capitol grounds, and to appropriate money therefor," it is provided in the first section, that an appropriation of ten thousand dollars be made for the purchase of iron fencing and the completion of the fence around the Capitol grounds.

The 3rd. section provides, that all the work, that can be done by convict labor on the said fence, shall be done by such labor, and the stone shall be taken from the quarry belonging to the State.

The 4th section says, that for the completion of the work the commissioner of the permanent seat of government is authorized to employ fifty convicts from the penitentiary, and the fifth section provides, that all claims for work and labor done shall be certified by the commissioner, and the auditor shall audit the same, and draw his warrant on the State Treasury for the amount of such claim.

At the same session, by an act approved March 22nd, 1873, the legislature passed an act to lease the State Penitentiary for the period of ten years. (Sess. Acts 1873, p. 85.) Under the provisions of this act the relators became the lessees of the penitentiary; and the ninth section of the act is as follows:

"The said lessees shall be required to furnish such number of said convicts, not to exceed fifty, at any time, as the State may require, to labor upon the State grounds or works at Jefferson City, and the warden shall give the said lessees thirty days' notice, specifying the number of hands required, a reasonable number of whom shall be skilled laborers; and the said lessees shall be allowed therefor at a rate not exceeding fifty cents per day for each of said convicts while so employed; provided, that said lessees shall not be allowed or paid for such convict labor furnished the State more than \$10,000 in any one year."

The two acts were passed at the same session of the legislature, they relate to the same subject matter—they are *in pari materia*, and, to arrive at the true legislative intent, they must be construed together.

By the act of March 20th, the appropriation is for the purchase of iron fencing, and the completion of the fence around

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the Capitol ground. The completion of the fence includes all the necessary work, such as dressing the stone, laying it up in the wall, and doing whatever is needed to make it complete.

It was one of the requirements, that all the work that could be done by convict labor was to be done by such labor, and for that purpose the commissioner of the permanent seat of government was to employ fifty convicts, and, by the subsequent act of March 22nd, the lessees were required to furnish the fifty convicts, which they did accordingly.

Were we interpreting the act of March 20th, by itself, the conclusion would follow, that nothing was to be paid for the convict labor, because at that time the State owned the labor and controlled it. But in two days afterwards a law was passed, by which the State sold, disposed of, and transferred all this labor to the lessees, and surrendered all control of it for a consideration.

The lessees then took upon themselves the burden of providing for and clothing the convicts, and received their labor in return. The State then had no further supervision or control over the convicts, or their labor, but reserved the right to have fifty of them employed at a stipulated price.

These fifty were furnished at the request of the commissioner who superintended the work, and I have no doubt about the relators being entitled to pay for them. I therefore think the writ should be issued.

The other Judges concur, except Judge Adams, who is absent.

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WILLIAM FICKLE, Respondent, *vs.* ST. LOUIS, KANSAS CITY
AND NORTHERN RAILWAY COMPANY, Appellant.

1. *Practice, civil—Circuit Court, jurisdiction of—Aggregate amount claimed in all the counts.*—A suit can be brought in the Circuit Court, provided the aggregate amount, claimed in all the counts of the petition, is sufficient to give the court jurisdiction [Smith *vs.* Clark county, *ante p.* 58].

2. *Railroads—Injuries to cattle—Double damages—Statute, construction of—Who to be plaintiff.*—In a suit against a railroad for double damages for injuries to cattle, brought under the statute (W. S., 310, § 43), the party injured is the proper plaintiff [Hudson vs. St. Louis, K. C. & N. R. R., 53 Mo., 525, affirmed].
3. *Railroads—Killing of cattle—Lack of fences—Presumption.*—If a person's cattle are killed on a railroad track, where the track passes through his inclosed field, at a point which was not a public crossing and where there was no fence, the presumption is, unless the circumstances of the case rebut it, that the cattle strayed on the track on account of the absence of the fence [Aubuchon vs. St. Louis & I. M. R. R., 52 Mo., 522].
4. *Practice—Supreme Court—General judgment on all the counts—New trial, motion for—Reversal.*—The Supreme Court will not reverse a cause, because a general judgment on all the counts was rendered for the plaintiff, when such question was not brought before the lower court in the motion for a new trial.

Appeal from Adair Circuit Court.

John M. Woodson, for Appellant.

I. The counts in the petition first filed were below the concurrent jurisdiction of Circuit and Justices' Courts, and the Circuit Court should have dismissed the same. (Clark's Adm., vs. Han. & St. Joe R. R. Co., 36 Mo., 202.)

II. The double damage liability imposed by § 43 (W. S., 310) is a penalty recoverable only in the name of the State of Missouri, under § 42 of the same Act. By taking sections 42 and 43, and construing them together, it will be seen, if such double liability is a penalty, that it was unnecessary to provide a means for the recovery thereof in such section 43, as such remedy or means is provided in section 42. Again, by section 5 (W. S., 520,) a full and complete remedy is given to the owner of any animal killed or injured, &c. Construing the two statutes as consistent statutes, it follows that section 5 defines the owner's right of recovery to the extent of the value of his property; and section 43, being a general police regulation, enacted for the protection of the public, defines the rights of the public, the people, the State of Missouri, which alone can sue for the penalty therein provided for. To the position taken it may be said, this court has passed upon this question of double liability in the case of Trice vs. Han. & St. Joe R. R. Co., 49 Mo., 436. It is admitted that, in that case, the question of double damages was involved; but the question now

presented, a want of jurisdiction in the court and the right of respondent to sue in his own name, were not considered.

That case is regarded as an authority to support this position. It undoubtedly settles the constitutionality of the statute requiring railroad companies to fence; but it as well settles the question that such statute would be unconstitutional, were it not that a penalty is imposed for a failure to fence, which the legislature may dispose of in its discretion; and being a penal statute, all of its provisions should be strictly construed. And if a means of enforcement is provided by any section of such statute, it should be pursued, and no remedy not specifically provided should be implied. (*State vs. Han. & St. Joe R. R. Co.*, 51 Mo., 532.)

III. The instructions asked by appellant should have been given. The respondent offered no evidence to show at what point the stock strayed upon the track. (*Cecil vs. Pac. R. R. Co.*, 47 Mo., 246.)

IV. "A general verdict on the several separate counts in respondent's petition was error." The motion for a new trial among others, assigned as a reason for setting aside the verdict, because the finding or verdict is not specific or proper." (*Bigelow vs. N. Mo. R. R. Co.*, 48 Mo., 510.)

DeFrance & Halliburton, for Respondent.

I. The Circuit Court had jurisdiction of the case originally, if all the counts together claimed judgment for \$20.00. (*Langham vs. Boggs*, 1 Mo., 476, and cases cited; *Judson vs. Macon Co. U. S. Cir. Ct., West Dist., Mo.* [April Term, 1873]; *W. S.*, 343, § 11; 14 Mo., 396; *Clark's Adm'r vs. Han. & St. Joe R. R. Co.*, 36 Mo., 202.)

II. The plaintiff under the evidence was clearly entitled to a judgment for double damages. (*W. S.*, 310-11, § 43; *Lafferty vs. Han. & St. Joe R. R. Co.*, 44 Mo., 291.)

III. Each count of the petition in this case is good under the decisions of the Supreme Court. (*Quick vs. Han. & St. Joe R. R. Co.*, 31 Mo., 393; *Miles vs. Han. & St. Joe R. R. Co.*, 31 Mo., 407.) They contain every allegation required by the statute. (*W. S.*, 310-11, § 43.)

IV. The error, if any, in the finding was not properly brought to the attention of the court below in the motion for new trial.

VORIES, Judge, delivered the opinion of the court.

This action was brought in the Adair Circuit Court, to recover double damages from the defendant for the killing of stock by the cars conducted by the agents of defendant, at a point on its railroad where the said road was not fenced, and in the inclosed field of the plaintiff where there was no public crossing, &c.

The amended petition of the plaintiff consisted of four counts, which were all similar in their allegations, except as to the description of the stock killed, and as to the amount of damages claimed.

The allegations of the first count of the petition are substantially as follows :

1st. That the defendant is a corporation, &c., and was on the 1st day of August, 1872, the owner and occupier of a certain railroad leading from the city of St. Louis to Bloomfield, Iowa, and passing through Adair county in the State of Missouri, and of certain cars and locomotives running thereon.

2nd. That the plaintiff was then the owner and possessor of two calves of the value of twenty dollars, which calves without the fault of plaintiff strayed upon the track of said railroad at a point on the same, where it passed through plaintiff's inclosed field, where said road was not fenced, and where there was no public crossing on said road.

3rd. That defendant by its agents and servants so carelessly and negligently ran and managed the said locomotive and cars, that they ran against and over said calves, killing one and crippling the other, at a point on said road where the same was not fenced, and where there was no public crossing on said road, and in plaintiff's inclosed field.

4th. That the plaintiff was damaged thereby in the sum of seventeen dollars, and prays a judgment for thirty-four dollars, double the amount of the damages so sustained.

The defendant filed a motion to dismiss the suit for the reason, that the petition consisted of four counts setting out four separate causes of action, none of which claimed damages for as much as twenty dollars, and that therefore the court had no jurisdiction of the case, except by an appeal from a justice's court. This motion was overruled, and the defendant at the time excepted.

The defendant then filed an answer, denying the material allegations of the petition, except that it did not deny its corporate existence. The case was tried by the court, a jury having been waived by the parties.

The only witness introduced on either side was the plaintiff, who was introduced in his own behalf. His testimony tended to prove, that he was the owner of the calves, one of which was killed by the cars of defendant on the 15th of August, 1872; that there was no public crossing of the road where it was killed; both calves were injured by the cars, one internally, the other had a leg broken; that he drove them from near the road track where they were found. The section hands of defendant hearing of the matter came and killed one of the calves and skinned it, the one killed was the one injured internally; that the other calf was left on plaintiff's hands, and was afterwards cured by him to a great extent; that there was no fencing on the road, where the calves were found; that it was inside of plaintiff's field; there was no public crossing inside of the field; that the value of the calf killed was \$12, and the other was damaged seven dollars.

The proof on the other counts was about to the same effect, except as to the value of the stock killed; the hogs described in one count were only proved to be worth 4 or 5 dollars, and in the other two counts from 12 to 15 dollars. At the close of the evidence, the defendant moved the court to make the following declarations of law:

"1st. The court declares the law to be, that under the evidence in this case plaintiff cannot recover in this action. 2nd. That in plaintiff's second count in the petition, he admits the value to be the sum of four dollars, which be-

ing beneath the concurrent jurisdiction of this court, plaintiff cannot recover in said count. 3rd. That in plaintiff's fourth count in his petition, he admits the value of stock to be \$10, which is beneath the concurrent jurisdiction of this court, and plaintiff cannot recover. 4th. That plaintiff has offered no evidence to show, that the animals, charged to have been injured and killed, strayed upon the track of defendant without the fault of plaintiff, or at a point of defendant's road where the same was not fenced, or where there were no cattle guards, and that said injury and killing were occasioned by reason of there being no fence or cattle guards.

The court refused these declarations of law, and the defendant excepted. The court then found for the plaintiff, and found his damages to be thirty-nine dollars, and rendered a judgment in his favor for double the amount of the damages found.

The defendant moved the court to set aside the finding in the case, and to grant a new trial for the following reasons: "1st. The verdict and finding are against the law and evidence. 2nd. Because the verdict and judgment are against the instructions. 3rd. Because the court erred in refusing defendant's instructions. 4th. Because the court admitted improper evidence. 5th. Because the finding or verdict is not specific or proper."

This motion being overruled, the defendant again excepted.

The defendant then moved the court to arrest the judgment: "1st. Because the petition does not state sufficient facts to constitute a lawful cause of action. 2nd. Because there is a misjoinder in the same. 3rd. Because there are joined in each count more than one cause of action." 4th. Because the judgment is not supported by the record or evidence. 5th. Because the counts are below the concurrent jurisdiction of Circuit and Justices' Courts. 6th. Because the judgment is for a greater amount than the value of the stock killed and damaged." This motion also being overruled, the defendant again excepted, and appealed to this court.

The first ground insisted on by the defendant for the reversal of the judgment is, that the Circuit Court erred in overruling its motion to dismiss the suit on the ground that the petition consisted of four counts, the amount claimed as damages in neither of which, it is insisted, amounted to a sufficient sum to give the Circuit Court jurisdiction of the same. That exact question was before this court at the present term in the case of *Smith vs. Clark County*, *ante* p. 58, and it was there held, that where the aggregate amount claimed in all of the counts brought the cause within the jurisdiction of the court, it was sufficient to confer jurisdiction over the subject matter. That decision is conclusive on this point.

It is next objected by the defendant, that this suit, having been prosecuted under the 43rd section of the law concerning Railroad Corporations (W. S., 310) for double damages, should have been brought in the name of the State under the provisions of the 42nd section of the same act, and could not be brought in the name of the person injured. That exact question was fully considered in the case of *Hudson vs. The St. Louis, Kansas City and Northern Railway Co.*, 53 Mo., 525, and it was there held, that the suit was properly brought in the individual name of the party injured, which may be considered as settling that point made in this case.

The next objection made by the defendant to the action of the Circuit Court is, that the court refused to declare the law, as asked for by the defendant, to the effect that the plaintiff had offered no evidence to show, at what point on the railroad the stock strayed on the road, and that they were caused to stray on the road by the neglect of the defendant to fence its road. To this objection it may be answered, that the evidence did tend to show that the stock went on the road in the plaintiff's inclosed field, where the road was unfenced, and where there was no public crossing. When it is proven that the stock were killed at such place, it certainly tends to prove that they there strayed on the road, and, if the road was not fenced, it is not necessary to prove affirmatively, that the stock was caused to stray on the road from the

want of a fence; that is a natural inference from the other facts, unless the inference is rebutted by the circumstances of the case. It is true that in the case of Cecil vs. Pacific R. R. Co., 47 Mo., 246, the learned Judge, in delivering the opinion of the court in that case, uses language that seems to conflict, with the view here taken, but in a later case decided by this court (Aubuchon vs. St. Louis & I. M. R. R. Co., 52 Mo., 522) it is held, that when it was alleged, that the defendant negligently and carelessly ran over and killed some of the cattle of the plaintiff, and that the same was done at the part of the road that was not fenced, and was not a public road crossing, the petition was sufficient. We think that that case was properly decided, and that the instruction or declaration of law asked for by the defendant in this case was properly refused.

The only remaining point insisted on by the defendant, as a ground for the reversal of the judgment, is, that the court rendered a general judgment in the case on all the counts in the petition, without making a separate finding on each count. It has been frequently held by this court, that such irregularities committed in the trial-courts will not be noticed in this court, unless the matter has been specifically brought to the attention of the trial-court by motion or otherwise.

The motion for a new trial in this case did not call the attention of the court to this objection. The only thing, that approached such objection, was that "the finding or verdict is not specific or proper." This is not sufficient. If the objection had been made to the trial court, that there was no separate finding on the several counts in the petition, the court, having tried the cause without a jury, would doubtless have corrected its finding, and the defendant would have had no cause to appeal to this court to have the finding corrected or the judgment reversed.

We see no substantial error in the record of this case, and the judgment will therefore be affirmed. Judge Adams not sitting, the other judges concurring, the judgment is affirmed.

A. M. GILMORE, Respondent, *vs.* ST. LOUIS, KANSAS CITY AND
NORTHERN RAILWAY COMPANY, Appellant.

1. Fickle *vs.* St. Louis, K. C. & N. R. R., *ante* p. 219, affirmed.

Appeal from Adair Circuit Court.

John M. Woodson, for Appellant.

See brief in Fickle *vs.* St. L., K. C. & N. R. R., *ante* p. 219.

Barrow & Millan, for Respondent.

I. The same strictness is not required in a finding made by a court as in one made by a jury.

II. If the petition is technically defective in not stating that the stock strayed on the road at a point where the same was not fenced, etc., yet the defendant having failed to demur, and the court having heard the evidence, and made a finding for the plaintiff, defect in the petition is cured.

III. The fact that the road was not fenced where said stock was killed, is certainly some evidence that the stock was on the road by reason of its not being fenced.

VORIES, Judge, delivered the opinion of the court.

This case is in every material matter identical with the case of William Fickle *vs.* The St. Louis, Kansas City, and Northern Railway Co., decided by this court at this term, *ante* p. 219, and, for the same reasons given in the opinion in that case, the judgment in this case will be affirmed.

Judge Adams being absent, the other judges concurring, the judgment is affirmed.

Lantz v. St. L., K. C. & N. R. R. Co.

JACOB LANTZ, Respondent, *vs.* ST. LOUIS, KANSAS CITY AND
NORTHERN RAILWAY Co., Appellant.

1. *Practice, civil—Trials—Evidence—Railroads—Killing cattle—Presumptions.*
—When it is shown in evidence, that cattle were killed by a railroad company, where their track passed through uninclosed prairie land, and where the track was not fenced, and where there was no road-crossing, the law presumes negligence on the part of the company.

Appeal from Adair Circuit Court.

John M. Woodson, and Ellison & Ellison, for Appellant.

I. The plaintiff was bound to prove, that the animal got on the track at a point where the railroad company was bound to fence its road. (Cecil *vs.* Pac. R. R., 47 Mo., 246.)

[The other points in the brief are necessarily omitted, not being reviewed by the court.]

Harrington & Cover, for Respondent.

I. The negligence is established by showing, that the injury was on a part of the road, not inclosed by a lawful fence, or not in the crossings of a public highway: (Brown *vs.* Han. & St. Joe. R. R., Co., 33 Mo., 309; Calvert *vs.* Han. & St. Joe. R. R. Co., 34 Mo., 242.)

WAGNER, Judge, delivered the opinion of the court.

This was an action for damages for killing a cow belonging to the plaintiff by the defendant's cars. The petition alleges, that the cow was killed on a part of defendant's road, where the same passed through uninclosed prairie land, and where the same was not fenced, and was not at a public road crossing.

At the trial, the killing of the cow by defendant's train was clearly proved, and also that it took place where the track was not fenced, and there was no road crossing. There was a verdict and judgment for plaintiff. A motion for a new trial was filed, assigning the usual reasons, and was by the court overruled.

The only question of law presented, deserving any attention, arises out of the ruling of the court in giving and refus-

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ing instructions. The defendant asked the court to declare the law to be, that there was no proof or evidence, that the cow strayed upon the track without the fault of plaintiff, or by reason of there being no fence or cattle guards or of defects in the same, or that the killing was occasioned by the fact of there being no fence or cattle guards to keep said cow off the track of defendant, and that, therefore, plaintiff could not recover.

This instruction was refused, and rightly refused.

When the plaintiff showed that the animal was killed where the road passed through uninclosed prairie land, and that it was not fenced, and that there was no road crossing at the place, there was no necessity for him to go further and show, that the cow strayed upon the track without his fault, or by reason of the track not being fenced. From the proof of killing under such circumstances the law presumes negligence, and it does not devolve on the plaintiff to prove it.

The plaintiff asked for no instructions, but the court gave two of its own motion. These instructions were entirely too favorable to the defendant; the plaintiff might well complain of them, but the defendant cannot.

Some matters have been presented by counsel, which are outside of the record, and we decline to notice them.

Judgment affirmed; all the judges concur.

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BENJ. W. ROGERS, Respondent, *vs.* THE CITY OF ST. CHARLES,
et al., Appellants.

1. *Dedication of land to the public—Subsequent condemnation.*—A dedication for an alley by acts *in pais*, being usually uncertain of proof and inclusive as to the public, is no defense against a proceeding by the proper authorities to condemn the property to public uses for the same purpose.
2. *Condemnation of land, costs of—Imperfect dedication—Constitutionality.*—There is a manifest hardship in compelling a property owner to pay the costs of a condemnation in which he gets nothing beyond the benefits derived from the improvement. But, *semble*, that there is no constitutional obstacle to this in a case where the owner, having undertaken, and still intending, to dedicate, yet refuses to sign a relinquishment which would make his imperfect dedication conclusive, and so avoid the proceedings.

Rogers v. City of St. Charles, et al.

Appeal from St. Charles Circuit Court.

A special ordinance of the city of St. Charles directed the opening of an alley across the rear of plaintiff's lot. An existing general ordinance provided, that in condemnation proceedings for streets, alleys, &c., all costs should be paid by the parties against whom damages (benefits) were assessed. Another provision exempted from such payment of costs the owners in a block who should execute voluntary relinquishments to the city. All the lot owners in the block executed such relinquishments, excepting the plaintiff, who refused to do so upon request, alleging that he had already thrown open the alley, and had executed deeds to private parties, in which the alley was made a descriptive boundary, and therefore no further act of relinquishment was necessary. The other facts and proceedings are set forth in the opinion of the court.

T. F. McDearmon and E. A. Lewis, for Appellants.

I. The Court erred in overruling defendants' demurrer. The petition shows on its face, that the proceedings were conducted and consummated by a tribunal which had jurisdiction over the subject matter and over his person, and yet that he voluntarily made no defense or objection before that tribunal. The matter was *res adjudicata*. (*Ewing vs. City of St. Louis*, 5 Wall., 413.)

II. If it were true, as alleged, that plaintiff had already dedicated the alley, that fact would have been, as much as in any other place, a ground of defense against the condemnation proceedings. The petition shows that he failed to make it there, and by that means effectually waived it.

III. Plaintiff's acts amounted to no dedication, except as between himself and his grantee. There was no dedication which the corporation could claim or act upon in the public interest. (*Becker vs. City of St. Charles*, 37 Mo., 13; *Washb. Eas.*, 141-2, 148-9, 151, 153; 2 *Greenl. Ev.*, 662; *State vs. Carver*, 5 *Strobh.*, 217; *People vs. Beaubien*, 2 *Doug. (Mich.)*, 256; *Bissell vs. R. R. Co.*, 26 *Barb.*, 634; *Badeau vs. Mead*, 14 *Barb.*, 328.)

Lackland & Broadhead, for Respondent.

I. The alley had already been dedicated to public use, and actually opened and used as such by the public, for four years prior to the commencement of the condemnation proceedings. It was unnecessary for the respondent to sign a deed of relinquishment to make the dedication complete. The dedication was already complete and irrevocable. (*Rose vs. The City of St. Charles*, 49 Mo., 509; *Stacey vs. Miller*, 14 Mo., 478; *Hannibal vs. Draper*, 15 Mo., 634; *McKee vs. City of St. Louis*, 17 Mo., 184.)

II. There is no power in the charter or ordinances of St. Charles to tax costs of condemnation proceedings against the party whose property is taken; and if there was, it would be unconstitutional, because to the extent of the costs it would be taking private property for public use without compensation. (Sess. Acts 1869, p. 142.)

NAPTON, Judge, delivered the opinion of the court.

This is a proceeding to enjoin the collection of (\$16.60) sixteen dollars and sixty cents — and the sale of plaintiff's lot under an execution issued by the city of St. Charles against the plaintiff, in accordance with a verdict and judgment rendered in certain proceedings for the condemnation of an alley over the lot. The grounds, on which the aid of the court is invoked, are, that the execution was illegal and that a sale under it, though voidable, would cast a cloud on plaintiff's title. The injunction was granted and made perpetual.

It appears from the pleadings and evidence in this case, that the authorities of St. Charles desired to open an alley adjoining the lot of plaintiff and others; and that the marshal applied to all those who owned lots on it for a relinquishment to the city of their title; that they all signed the relinquishment except plaintiff, who declined for the reason, as he said, that he had already dedicated that portion of his lot within the limits of the contemplated alley to the public use, and that his deed of relinquishment was, therefore, unnecessary. The city authorities instituted proceedings for its condemnation,

duly apprising him of the proceedings; to which, however, he paid no attention; and ultimately these proceedings resulted in a verdict, that the value of his ground was seventy-five dollars and the benefits he received were seventy-five dollars, and, upon this being ratified by the recorder, execution issued against plaintiff for sixteen dollars and sixty cents for the costs.

There are no serious objections to the formality of these proceedings; the whole ground, upon which the plaintiff puts the invalidity of these proceedings, is, that they were unnecessary, inasmuch as he had already dedicated the ground to public use; and to sustain this he produced evidence to show he had fenced his lot with reference to such dedication, and had sold other lots in the same way.

We think there is no force in this point. A dedication by acts *in pais*, or by parol, may be a very good and sufficient one; but such matters are necessarily of uncertain proof, and what amounts to a dedication is by no means beyond litigation. It was for the city authorities to decide, whether this proceeding was necessary or not, and as the plaintiff refused to make the relinquishment when applied to for this purpose, it was right and expedient that the matter should be settled in a more conclusive way than by mere declarations and acts of plaintiff.

The only difficulty in the case, to our minds, is the constitutional right of the city to make the plaintiff pay the costs of the proceeding. It seems to be conceded, that the ordinance required that the costs should not, in cases of opening alleys or paving streets, be charged to the city, but should be paid by the adjoining lot holders, doubtless for the reason that they were assumed to have a special interest in such improvements over and above other citizens or the city at large. The ordinance justified the execution for costs against plaintiff, since the former ordinance had exempted the other lot owners who relinquished voluntarily, and as the city was not liable, the plaintiff necessarily was charged with them, if the provisions of the ordinance were carried out.

We confess it looks rather hard for a man to have his lot condemned, without any compensation except in benefits, and be made to pay the costs of the proceedings. As the plaintiff, however, could have avoided all this difficulty by simply signing a relinquishment to land which he insists he had already relinquished, the hardship on him is of his own seeking.

We think the judgment should be reversed, and it is reversed. The other judges concur.

MOTION FOR RE-HEARING.

Respondent filed a motion for review and re-hearing, upon which briefs were submitted, with the following points and authorities:

Lackland & Broadhead, for Respondent.

I. Has the city the constitutional right to take a man's property for public use, and make him pay the costs of the proceeding? Respondent was not bound by any law, or by any obligation whatever, to sign a deed of relinquishment to the city. To take his property against his consent, and then charge him with the costs of the proceeding, is in derogation of common right and the constitution; because it detracts from and diminishes the "just compensation," which he is entitled to. The owner is in no default or *laches*, and is liable to no penalty of costs, as in an ordinary suit. (*N. Mo. R. Co. vs. Reynal*, 25 Mo., 534.)

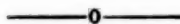
II. No authority is expressed in the city charter for a taxation of costs against the land owner. A corporation can exercise no power but what is given in the terms of the charter, and every doubt of its authority must be solved against the corporation. (*Dill. Mun. Corp.*, 102-104, and notes; 576, 605; *Sess. Acts*, 1869, p. 151.)

E. A. Lewis, for Appellants.

I. The constitutional right to "just compensation" for pri-

vate property taken for public use, is like all other constitutional rights, which may sometimes require expenditures in costs to secure their enforcement. There is no rule of law, that a party defending upon or asserting a constitutional right shall be necessarily exempted from liability for costs. Two distinct rights are equally recognized by the constitutional provision: One in the government to "take" the property for public use, and another in the owner to have compensation therefor. The proceeding in condemnation is an assertion by the authorities of their constitutional right to take the property. It might be claimed in their behalf, that to tax them with costs would be to exact of them something more than the "just compensation" to the owner, which is the only constitutional condition imposed. Litigation on the part of the owner, in these cases, usually consists in his denial of the right of the authorities to take his property as they propose to do—whether by reason of insufficient "compensation" or for other causes which equally assail their constitutional claim. The issues being finally determined for the authorities, the statutory provision prevails to the effect, that "in all civil actions or proceedings of any kind the party prevailing shall recover his costs." (W. S., 343, § 6.)

Motion overruled.



IN THE MATTER OF JEFFERSON COUNTY, Respondent, vs. JOHN EPES COWAN, *et al.*, Appellants.

1. *Public roads, opening of—County Courts—Circuit Court, appeal to—Re-examination.*—In proceedings to open public roads, the Circuit Court, on appeal from the County Court, shall proceed to hear and try the cause anew. (Sess. Acts 1872, p. 146, § 50; p. 148, § 71.)
2. *Inferior courts, circumscription of their powers—County Courts—Opening public roads—Petition.*—Inferior courts, and those of statutory origin, must be circumscribed within the confines of the statute, which gives them being. Hence, where a petition to the County Court, praying that a public road be opened, does not show that it was signed by at least twelve householders of the township or townships, in which said road is desired, three of whom were of the immediate neighborhood as required by statute (Sess. Acts 1872, p. 140, § 8), the County Court has no jurisdiction in the premises

Appeal from Jefferson Circuit Court.

E. B. Cowan, & Jos. J. Williams, for Appellants.

I. The Circuit Court erred in dismissing the appeal and refusing to try the case anew, upon the merits of the allegations of the appellants. (Sess. Acts 1872, p. 146, § 50.)

II. The petition has not thereto the names of three residents of the immediate neighborhood of the proposed road, as required by the statute. (Sess. Acts 1872, p. 140, § 8.)

Pipkin & Thomas, for Respondent.

I. The Legislature could not have intended to embrace, in the provision that any person aggrieved might appeal (Sess. Acts 1872, p. 146, § 50), any person, who, having no personal rights affected, might think the road not of sufficient public utility to justify the County Court in ordering the road to be opened. (10 Mo., 364; 28 Mo., 37; 44 Mo., 216.) Then "any person aggrieved" means some person who is affected in some of his rights which are independent of those of the public. It is clear then, that the Circuit Court had no power to try anew the question as to the utility of the proposed road.

II. The sole objection of the appellants goes to the utility of the road, and they claim the right by the provisions of § 71 to try this question anew. But § 27 makes the report of the second set of commissioners final. This provision was intended to give the objectors to the utility of the road an opportunity to be heard, and to make their objections good if they could; but if they could not satisfy the second commission of the inutility of the road proposed, then they should not be heard afterwards to complain.

III. The appellants have failed to appeal from the assessment of damages, and are cut off from inquiring into the utility of the proposed road.

John L. Thomas & Bro., for Respondent.

I. As to whether the proposed road will be of any public utility could not be tried anew in the Circuit Court for there is no provision of the statute, or common law, by which such

a question can be made a triable issue. And upon this question of utility the appellants are no more interested than other citizens, and they cannot have themselves made parties to this proceeding to try such an issue, either in the County or Circuit Court, for the want of interest, nor could they appeal that question. (10 Mo., 364; 28 Mo., 37.)

SHERWOOD, Judge, delivered the opinion of the court.

The proceedings in this case were instituted in the County Court of Jefferson county by certain petitioners, who prayed that a public road might be opened and established in that county from the mouth of Rock Creek, as its initial, to Jefferson Station, as its terminal point.

At the same term, at which this petition was presented to the County Court for its action, a remonstrance was presented also by Cowan, and others, setting forth many excellent reasons why the prayer of the petitioners should not be granted.

The court however appointed three commissioners, who made what they called a report, and thereupon Cowan, and others, renewed their objections, and the court then appointed three other commissioners, who likewise made a report, which is a perfect parallel to the first in its signal failure to lay any basis on which a valid order or judgment could be rendered. Cowan, and others, then filed objections to the petition and both reports, and offered testimony to establish those objections, but this was denied them. The report of the second commissioners was approved, and the proposed road ordered to be opened 30 feet wide, (the only place in the record where any width for that road is specified; although damages had been assessed).

The objectors then moved to set aside the order for opening the road, but this motion was overruled, and they appealed to the Circuit Court, which refused to try the cause anew, but on motion of respondent dismissed the appeal, and refused on motion of appellants to set aside the order of dismissal, and appellants, having saved their exceptions, bring this case here by appeal.

The Circuit Court unquestionably erred in dismissing the appeal, and in thus affirming the judgment of the County Court. Material modifications have been made in the road law as it existed under the act of March 23rd, 1868, by the act approved March 18th, 1872, (Sess. Acts 1872, p. 139). Section 50 of the latter law expressly allows appeals in this class of cases, and § 71 of the same statute, with equal explicitness, provides, that on such appeals being taken "the Circuit Court shall be possessed of the cause, and shall proceed to hear and determine the same anew."

And the mere fact of that section prohibiting the Circuit Court from appointing commissioners, by no means detracts from the power conferred and the duty imposed on that court by the same section of re-examining the whole cause again, if necessary, on its merits.

This privilege of appeal to, and trial anew by, the Circuit Court in matters of this sort, is one of no small moment to the citizen, whose rights are most prone to be ignored or disregarded, as amply shown in the present instance, by the hasty and inconsiderate action of the inferior tribunals of the country.

And no doubt it was to prevent this very evil of having those rights thus finally concluded in a court of first resort, that the above cited statute of March, 1872, was passed.

This record abounds with almost numberless errors; but without stopping to comment upon or point them out, I will only advert to two, which are necessarily fatal to the application for the proposed road.

Section 8, of the act last referred to, provides that these applications must be "signed by at least twelve householders of the township or townships in which said road is desired—three of whom shall be of the immediate neighborhood."

No allegations of this character are found in the petition nor in the record. The County Court, therefore, had no jurisdiction in the premises. A more salutary rule does not exist, nor one longer sanctioned by reason, experience and authority, than that which circumscribes courts of limited powers and statutory origin within the confines of the statute which

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gives them being, and pronounces all their acts void which over-step the narrow boundary. (Schell vs. Leland, 45 Mo., 289; Smith vs. Haworth, 53 Mo., 88.)

The judgment is reversed, and the petition dismissed. The other judges concur.



HELEN M. SHIPP, (late Helen M. Spencer) *et al.*, Plaintiffs in Error, vs. GEORGE A. KLINGER, Defendant in Error.

1. *Statutes—Constitutionality of—Minors declared of age.*—It is too late now to question the constitutionality of an act of the Legislature, passed prior to 1865, declaring a minor of age and legally competent to transact his own business.

Error to St. Charles Circuit Court.

Buckner & Kellar, for Appellants.

I. The act, declaring this plaintiff of age, was not a legislative enactment, but a judicial decree, and therefore void. (4 N. H., 572; State vs. Fry, 4 Mo., 120; Dartmouth Col. vs. Woodward, 4 Wheat., 518; Blackw. Tax Titles 25-30; Bryson vs. Campbell, 12 Mo., 498; Bryson vs. Bryson, 17 Mo., 590; 4 West. Law J., 337; Jones vs. Perry, 10 Yerg., 59; Keith vs. Ware, 2 Ver., 174; Lyman vs. Mower, 2 Ver., 517; Kendall vs. Dodge, 3 Ver., 360; Edward vs. Pope, 3 Scam., 465; Lane vs. Dorman, 3 Scam., 238; Sedg. Const. & Stat. Law, 166-176 and cases cited.)

Theodore Bruere, for Defendant in Error.

I. The unconstitutionality of law must plainly appear before the court can interpose. (Stephens vs. St. Louis Nat. Bank, 43 Mo., 385; State vs. Cape Girardeau & State L. R. R., 48 Mo., 468.)

II. The constitutionality of such acts has been, if not directly, yet sufficiently settled in our State in similar cases before this court. (Stewart vs. Griffith, 33 Mo., 13, and cases cited.)

III. In support of the judgment, the respondent refers to *Rice vs. Parkman*, 16 Mass., 326; *Davison vs. Johonnot*, 7 Met., 388; *Sedg. Stat. and Const. Law*, 142; 1 *Cooley Const. Lim.*, 98, 100, 103; *Florentine vs. Barton*, 2 Wall., 210; *Watkins vs. Holman*, 16 Pet., 25; *Patterson's Dwar.*, 488, 489; *Clarke vs. Van Surlay*, 15 Wend., 441; 20 Wend., 365; *Carroll vs. Olmsted*, 16 Ohio, 251; *Wilkinson vs. Leland*, 2 Pet., 627; *Calder vs. Bull*, 3 Dall., 386.

WAGNER, Judge, delivered the opinion of the court.

This was a petition in ejectment to recover the possession of a tract of land lying in St. Charles county, and the only question presented for our consideration involves the constitutionality of an act of the legislature.

By the record it is shown, that the land in controversy belonged to the plaintiff, and that in 1864, when she was in her eighteenth year, an act of the legislature was passed declaring her of lawful age and legally competent to transact her own business. (Acts 1864, p. 392.) In accordance with this act she sold and conveyed the land to the defendant. It is now insisted, that the act was unconstitutional and void, and that it was not an exercise of legislative power, and that the deed made in pursuance of it passed no title.

Whatever might be our opinion in regard to the policy or even validity of such acts under different circumstances, we are constrained at the present day to hold them good. An examination of the session acts will show, that from an early period in our State's history acts of this description were passed at almost every session, that their legality was never challenged, and that they were constantly acted upon.

It would be entirely safe to say, that millions of dollars have been invested upon the strength of these titles, and for the courts at this day to declare the acts, and the titles made in pursuance of them, void, would be a hazardous undertaking, and would unsettle property rights to an alarming extent.

We must therefore decline to go into the question, or consider it open to discussion. The Constitution of 1865 very wisely prohibited in express terms the special enactment of

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such laws, and the abuses, which were practiced under the former constitution in this respect, cannot again occur. But passed titles which were made and received, when the acts giving them validity were universally acquiesced in, cannot now be disturbed.

The court below decided for the defendant, and its judgment must be affirmed.

The other judges concur.

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GERHARD GRAU, Defendant in Error, vs. ST. LOUIS, KANSAS CITY AND NORTHERN RAILWAY COMPANY, Plaintiff in Error.

1. *Justices' courts—Railroads—Statement—Jurisdiction—Surplusage.*—In a suit against a railroad before a justice of the peace, the statements filed stated the cause of action and claimed \$50 damages, and afterwards asked double damages "in accordance with the statute in such cases made and provided." *Held*, that the request for double damages might be disregarded as surplusage, and that the justice had jurisdiction of the cause.
2. *Railroads—Accidents—Damages by cattle—Statement of cause of action—Double damages—Statute, construction of.*—In a suit for damages by a railroad, it appeared by the allegations and evidence, that one of its trains was wrecked, where the track ran through plaintiff's field; that there was no fence along the track; that the hogs and cattle in the train were necessarily turned into the field in the attempt to extricate them from the wreck; that they were collected together and driven away, and that while in the fields they damaged the crops. There was no allegation that the damage was caused by the failure of the railroad to construct or maintain fences or cattle-guards, as required by law. *Held*, that in such case the statute (W. S., 310-11, § 43) did not contemplate the allowance of double damages.

Error to Warren Circuit Court.

Woodson & McKeag, for Plaintiff in Error.

I. The subject matter constituting the cause of action being for injuries to personal property, the justice of the peace had only jurisdiction to the amount of fifty dollars; consequently the case must be dismissed. (W. S., 807, 808, §§ 2, 3; *Han. & St. Joe. R. R. Co. vs. Mahoney*, 42 Mo., 467; *Webb vs.*

Tweedie, 30 Mo., 488; Langham vs. Boggs, 1 Mo., 476; Lindell's Adm'r vs. Han. & St. Joe. R. R. Co., 36 Mo., 543; Voorhees vs. Bank, U. S., 10 Pet., 449.)

II. There is no testimony showing that it was the failure to erect the fence that was the cause of the destruction of the crops. It was the act of turning the cattle into the field, and the destruction of the corn and fodder, that constituted the cause of action, and § 43 (W. S., 310-11) was only intended for cases where stock escapes from, or comes upon, lands, where such fences are not maintained, and § 8 (W. S., 1346) was only intended for cases where there was wantonness in the trespass, but the case at bar, and the evidence of the witness, show, that the trespass was involuntary. (W. S., 814, § 13; Walther vs. Warner, 26 Mo., 143; Marmaduke vs. McMasters, 24 Mo., 51; Franz vs. Hilterbrand, 45 Mo., 121; Engle vs. Jones, 51 Mo., 316.)

E. A. Lewis, for Defendant in Error.

I. No objection to the jurisdiction of the justice can be urged in this court. No such objection was raised, either before the justice or in the Circuit Court. (Newton vs. Miller, 49 Mo., 298; Boyse vs. Burt, 34 Mo., 74; Cornelius vs. Grant, 8 Mo., 59; Swearingen vs. Newman, 4 Mo., 456; Alexander vs. Hayden, 2 Mo., 211.) It was not claimed in the court below, that the doubling of the damages effected an excess over the jurisdiction of the justice.

II. There was no error in doubling the damages. (W. S., 310, § 43; Cross vs. U. States, 1 Gallison, 26; Withington vs. Hilderbrand, 1 Mo., 280; Brewster vs. Link, 28 Mo., 147; Ellis vs. Whitlock, 10 Mo., 781.)

VORIES, Judge, delivered the opinion of the court.

This action was brought before a Justice of the Peace to recover for damages charged to have been done to plaintiff's corn and fodder by the conduct of the employees of the defendant while running and operating cars on defendant's railroad.

The cause of action filed with the justice charges, that the defendant is a corporation, &c., and that as such it was on the

22d day of Oct., 1872, operating its railroad running through Hickory Grove Township in Warren County; that it was the duty of the defendant, by virtue of the statutes of this State, to erect and maintain fences on the side of said railroad, where the same passed through or adjoined inclosed or cultivated fields, &c.; that on said day plaintiff was the owner and in possession of a cultivated field, through which said road was located for a distance of one-fourth of a mile, that defendant failed and neglected to erect or maintain fences along the side of said road and field as required by law, and that by reason thereof a large number of hogs and steers on the 22d day of October, 1872, were turned into said field of plaintiff by the servants and agents of defendant, and beat down, injured and destroyed the corn and fodder standing and being in said field, by which the plaintiff was damaged in the sum of fifty dollars, for which he asked judgment.

The statement then stated, that, in pursuance of the statute in such case made and provided, he prayed the court to render judgment for double damages, one hundred dollars.

The cause was heard before the justice, where a judgment was rendered in favor of plaintiff for one hundred dollars, double the damages claimed or proved to have been done plaintiff by the injury complained of.

From this judgment the defendant appealed to the Warren Circuit Court, where the case was tried by the court, a jury having been waived by the parties. The evidence given on the trial in the Circuit Court was uncontradictory and showed the following facts: On the 22d of October, 1872, while a train of freight cars was being conducted along defendant's railroad through plaintiff's field, and where the said road was unfenced, it by some accident ran off of the track, and a number of the cars were badly wrecked; that several of the cars were freighted with hogs and cattle; that the hogs and cattle in these wrecked cars necessarily had to be unloaded, that some of them were injured, that the road was so blocked up with wrecked cars, that it was impossible to drive the cattle and hogs, which were being unloaded, along the railroad to

where defendant had stock pens, at Wright City, about one mile distant, consequently, as the hogs and cattle were unloaded, they were turned into and driven through plaintiff's field; that the time occupied in unloading the stock and driving it through plaintiff's field was from forty-five minutes to one hour; that in this time the shocks of corn, belonging to plaintiff and situated in the field, were considerably eaten and tramped down; that the cattle were driven out of the field by the hands and servants of the defendant, as soon as it could conveniently be done after they were extricated from the wrecked cars. It was admitted by the parties, that the evidence justified the finding of the damages done plaintiff to be thirty-five dollars as single damages.

At the close of the evidence, the defendant asked the court to declare the law to be, "that if the cattle and hogs, that destroyed plaintiff's corn and fodder, were cattle and hogs that were in defendant's cars in transit, and, in consequence of a train running off of the track and the cars getting wrecked, the agents and servants of the defendant turned said cattle and hogs into plaintiff's field after getting them extricated from the wreck of said train, and that they had said stock removed as soon as possible out of plaintiff's field, the plaintiff is only entitled to recover the actual amount of damages done to his corn and fodder, and is not entitled to judgment for double damages as is provided for in Wagner's Statutes, 310-11, § 43.

This declaration of law was refused by the court, and the defendant excepted. The court then rendered a judgment in favor of the plaintiff for thirty-five dollars, after which plaintiff moved the court to double the damages and render a judgment therefor. This motion was sustained by the court, and judgment accordingly rendered for seventy dollars.

The defendant in due time filed a motion for a new trial assigning for grounds thereof, that the court had refused proper declarations of law, and that the judgment rendered was against the law of the case. This motion being overruled, the defendant again excepted, and has brought the case to this court by writ of error.

The first question for the consideration of this court presented by the plaintiff in error is, as to the jurisdiction of the Justice of the Peace over this action. It is insisted in this court by the plaintiff in error, that the jurisdiction of the justice was limited to fifty dollars, and that as double damages were claimed by the plaintiff amounting to the sum of one hundred dollars, that the justice had no jurisdiction of the action.

By an examination of the cause of action filed before the justice, it will be seen that the charges therein, which, it is intended, shall constitute the plaintiff's cause of action, are, that the defendant failed and neglected to erect and maintain good or substantial fences along the side of defendant's railroad, where the same passed through plaintiff's field, that by reason of such failure a large number of hogs and steers were turned into said field of plaintiff by the servants and agents of defendant, and beat down, injured, and destroyed the corn and fodder of plaintiff, standing and being in said field, by which the plaintiff was damaged in the sum of fifty dollars, for which he asked judgment.

This is really the whole cause of action as stated by the plaintiff; he only claims to have been damaged in the sum of fifty dollars, and asks for a judgment for that amount. It is true that, after praying for judgment for fifty dollars, the plaintiff proceeds to state that in pursuance of the statute, in such case made and provided, he prays the court to render judgment for double damages, one hundred dollars. This I think may be considered in this case as mere surplusage; the action was really an action for damages in the sum of fifty dollars, and our statute gives justices of the peace concurrent jurisdiction in all actions for injuries to persons or to personal or real property, wherein the damages claimed shall exceed twenty dollars and not exceeding fifty dollars, and under our law as it now stands, and has been construed, Railroad Companies may be sued in such cases before justices of the peace. (*Williams vs. N. Mo. R. R. Co.*, 50 Mo., 433.)

And notwithstanding it has been held by this court, that it is

sufficient in actions brought to recover double damages under the 43rd section, chapter 63, General Statutes, 1865, that the statement advise the opposite party of the nature of the claim, and be sufficiently specific to make the judgment a bar to another action (Norton vs. Han. & St. Joe. R. R. Co., 48 Mo. 387), yet in the present case neither the statement filed with the justice, nor the evidence, would authorize the recovery of double damages. The statement filed with the justice states, that the agents conducting the business of the defendant turned the hogs and steers into plaintiff's field, and the evidence shows, that by an accident, which occurred on the railroad, by which the cars were wrecked at a place where the road adjoined plaintiff's field, it became almost or quite absolutely necessary, in order to extricate the stock from the wrecked cars, to turn them into and drive them through the plaintiff's field, by which the damage was done of which plaintiff complains. There is no pretense, either in the statement filed before the justice, or in the evidence, that the hogs or steers escaped from and came upon said field of plaintiff *by reason of the failure of defendant to construct or maintain such fences or cattle guards* as the law requires.

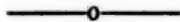
The statement filed states that the cattle were turned into the field by the agents of the defendant, and the evidence shows, that they were turned in in consequence of a necessity created by an accident over which defendant had no control. It could not have been intended by the legislature, that double damages should be recovered in such a case.

The statute only contemplates cases, where cattle or other animals go upon the lands and inclosed fields of parties in consequence of the failure to fence the same. It is true, that where the cattle do trespass upon fields though which a railroad passes, and where no fences are constructed, it might be a natural inference that they so trespassed in consequence of the failure to fence; but where, as in this case, the circumstances all rebut the idea that they were caused to go on the land from the want of proper fences, and show that they were actually turned into the field for protection, the case does

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not come within the contemplation of the statute, and no double damages can be recovered. It therefore follows, that the Circuit Court erred in sustaining plaintiff's motion to render judgment for double the amount of the damages found, and in overruling the declaration of law asked for by the defendant. The judgment rendered by the Circuit Court is therefore reversed, and, inasmuch as it is admitted by the parties in the bill of exceptions, that the court was justified in finding that the actual damages sustained by the plaintiff were thirty-five dollars, judgment will be entered here for the sum of thirty-five dollars, and it is ordered, that the plaintiff be taxed with the costs incurred upon the writ of error up to the rendition of judgment in this court.

The other judges concur.



JOHN F. DIERKER, SHERIFF OF ST. CHARLES COUNTY, TO THE
USE OF CORNELIUS SHOEMAKE, Respondent, *vs.* CHARLES E.
HESS, *et al.*, Appellants.

1. *Parent and child—Child's earnings, claim to, how relinquished.*—The relinquishment of the father's claim to the earnings of his minor son may be established by direct evidence, or may be implied from circumstances.

Appeal from St. Charles Circuit Court.

B. B. Kingsbury, for Appellant.

I. The earnings of a minor may be given to him, but there should be clearly shown to be a severance of the legal relation of parent and child. The emancipation must be complete and notorious—an advertisement to the world, that the child has become a man for himself, to act, possess, and control entirely and exclusively his own time, talents, and labor, and which must be continued, and not an occasional manifestation. (Reeves Dom. Rel. [Parker & Bald. Ed.], 422; Godfrey vs. Hays, 6 Ala., 501; Stovall vs. Johnson, 17 Ala., 14; Clinton vs. York, 26 Me., 167; Swain vs. Tyler, 26 Ver., 9;

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St. George vs. Deer Isle, 3 Me., 390; Wells vs. Kennebunk, 8 Me., 200; Dennysville vs. Trescott, 30 Me., 470; U. S. vs. Mertz, 2 Watts, 406; Winchester vs. Reed, 8 Jones, [N. C.] 377; Worth vs. York, 13 Ired., 206; Bump Fraud. Convey., 273.) The gift could have been returned. (Cranz vs. Kroger, 22 Ill., 74.) The relation of parent and child could be resumed, (Everett vs. Sherley, 1 Iowa, 356,) and both the son and father acted as if the relation had been resumed.

II. The case of McCloskey vs. Cyphert, (27 Penn. St., 220,) was one, where the minor by means of funds furnished by friends, and by his own exertions, leased the land, which had been levied on and sold as the property of his father, and by his exertions, and assistance of friends, raised the crops levied on by creditors of his father.

III. The respondent was bound to take and continue in the exclusive possession and control of the property claimed by him after the alleged gift. (W. S., 280, § 4; Bump Fraud. Convey., [Ed. 1872] 182, 183; Claffin vs. Rosenberg, 42 Mo., 439; Lesem vs. Herriford, 44 Mo., 323.)

IV. The circumstances of the case should have been allowed to be weighed by the jury under the instruction of the court, asked for. (Howe vs. Waysman, 12 Mo., 169.)

V. The instruction, respecting fraudulent combination to defraud creditors, should have been given. There was sufficient evidence to warrant it. (Hillard New T., 278, § 37 *et seq.*; Ridens vs. Ridens, 29 Mo., 470.)

VI. The instructions of court were vague and indefinite, (Hillard New T., 271, 272,) and contained an incorrect enunciation of the law, respecting minority of child. (See cases under first point.)

Lackland and Broadhead, for Respondent:

I. If the father allows the minor son his wages and earnings, the father cannot demand them either from the minor or his employer, nor can they be attached by the father's creditors. (1 Pars. Conts., 258; 1 Story Eq., 77, § 74.)

II. Where the owner does not allow creditors to be misled

Dierker, to use of Shoemake v. Hess, et al.

by his silence, or by his acts and declarations, other than the mere act of allowing it to remain in another's possession, then he is not estopped to claim the property. (*McDermott vs. Barnum*, 16 Mo., 114.)

SHERWOOD, Judge, delivered the opinion of the court.

Action in the St. Charles Circuit Court on an indemnifying bond to the use of Cornelius Shoemake, brought by Dierker, to whom, as sheriff, the bond was executed by Hess, administrator of John Spencer's estate, and plaintiff in an execution levied upon certain horses and hogs as the property of Enoch Shoemake, but claimed in due form of law by Cornelius Shoemake, the son, as his property. A sale under the execution took place, and this suit is to recover the damages arising from such sale.

When the cause came on for trial, a jury was impaneled, and evidence adduced to this effect, that the father, Enoch, had several years previously given to his son, Cornelius, during his minority the privilege of appropriating his earnings to his own use; that the son exercised the privilege thus granted him, and devoted those earnings to the purchase of horses and hogs, which with their increase was the subject of the levy of the execution, and the basis of the present litigation; that the son brought his purchases home to his father's house, continued to reside there, marked his hogs with his father's mark, permitted his stock to run with that of his father, let his father use the horses, sometimes used them himself in working on his father's farm and in assisting him to cultivate the same; that the son received no wages for such work, nor did the father charge him any board; that the son's horses and hogs were fed with the father's, that no separate crib or account was kept, but that the son used at times to pay the father for the corn so used; and that, when the son left home, the property was left in the possession and care of the father during his absence; that the son always claimed, and the father always recognized, the property as his son's, and never claimed it as his own. There

was some conflict in the evidence, but nothing having the slightest tendency to show any fraudulent combination between father and son to defeat the creditors of the former.

The court of its own motion gave these instructions at the close of the testimony:

"The real question to be determined by the jury is, as to the ownership of the horses and hogs levied on as the property of Enoch Shoemake, and claimed by Cornelius Shoemake. And if it has been proven to the satisfaction of the jury, that the horses and hogs in controversy, and so levied on, belonged to the plaintiff, Cornelius Shoemake, at the time of the levy, and that he notified the sheriff in writing of his claim to the property before the sale, then the plaintiff is entitled to recover, and the measure of his damages is the market value of the property at the date of the levy; and unless it has been so proven, the verdict must be for the defendants. And the jury are further instructed, that the question of property in the horses and hogs is to be determined by considering all the facts and circumstances in evidence as to the claim, use, control and possession of the property, including the minority of the claimant, and his permission to claim and enjoy his own wages while a minor. And the law as to minority is declared to be: If the minor is permitted to work for himself, and claim and enjoy his own wages, then he may purchase and own property independent of the parent's control. And if it has been made to appear from the evidence, that the creditors of Enoch Shoemake were misled by the acts and declarations of Cornelius Shoemake as to the ownership of the property, then the plaintiff is not entitled to recover."

To the giving of which the defendants excepted.

The defendants then asked several instructions, which were refused, and they excepted to this ruling, and also to the overruling of their motion for a new trial upon the return of a verdict in favor of the plaintiff.

The instructions given by the court at its own instance contained a full and fair exposition of the law applicable to the facts adduced in evidence.

The doctrine contended for by appellants' counsel is, although supported by several authorities, peculiarly abhorrent to my mind. It is not necessary, that the father, in order to give his minor son the privilege of receiving the fruits of his own labor, should proclaim that fact from the housetops, or accompany it by some token or ceremonial, as open and as odious as that which formerly attended the manumission of a slave; nor is it necessary to accomplish that end, that the son should cease to be a member of his father's family; that the dearest domestic ties should be rudely sundered, and he driven like some alien and outcast from beneath the paternal roof.

The fact, that the father has thus relinquished his claims to the son's earnings, may be established either by direct evidence or be implied from circumstances; and, where such relinquishment has been *bona fide* effectuated, it does not lie in the power of some prowling creditor to wrest from the son the gains he has achieved by honest industry, under the specious and covetous pretext that the property belongs to the father.

As is well said in *McCloskey vs. Cyphert*, (27 Penn. St., 220): "If he (the father) happens to be in debt, he is not bound to work his son or daughter as he would a horse or slave for the benefit of his creditors." (Sto. Const., § 74; *Morse vs. Welton*, 6 Conn., 547; *Jenney vs. Alden*, 12 Mass., 385; 2 Kent, 193; *Whiting vs. Earle*, 3 Pick., 201; *Corey vs. Corey*, 19 *Id.*, 29; *Canovar vs. Cooper*, 3 Barb., 115, and cases cited; *Cloud vs. Hamilton*, 11 Humph., 104; *McCloskey vs. Cyphert*, 27 Penn. St., 220; *Galbraith vs. Black*, 4 Serg. & R., 207.)

As to whether the father, in the present instance, had waived his right to the services of his son, was a question, which, together with all other issues of fact necessary to be passed upon, was fairly left to the jury to answer; and their reply contained in their verdict must be a finality.

The propriety of the refusal of the defendants' instructions has been incidentally discussed in the foregoing remarks; as all the ground, which the defendants could on the facts of

the case legitimately occupy, was completely covered by the instructions given.

The judgment is affirmed. Judge Adams absent. The other judges concur.

—o—

MARY A. McALISTER, Appellant, *vs.* SARAH NOVENGER, *et al.*,
Respondents.

1. *Dower—Adultery—Statute, construction of.*—A. moved to Missouri, intending to purchase land and establish his home there. His wife declined to accompany him, saying that she might not like his new home. It was finally agreed, that he, if he purchased land, should come for, or send after, her. The wife afterwards committed adultery with one man, and subsequently married another, knowing that her first husband was still alive. She never joined her first husband, and was living with the second husband when she brought suit for dower in the land of her first husband. *Held*, that the separation must be considered as voluntarily made on her part, and her subsequent conduct forfeited under the statute (Wagn. Stat., 542, § 20,) her claims on her first husband's estate for dower.
2. *Dower—Separation—Adultery—Reconciliation—Statute, construction of.*—If a husband and wife voluntarily separate, or the wife willingly and voluntarily lives apart from her husband, and afterwards lives in adultery, and no subsequent reconciliation takes place, she is barred from claiming dower in her deceased husband's estate. (Wagn. Stat., 542, § 20.)

Appeal from Adair Circuit Court.

Barrow & Millan, for Appellant.

I. If plaintiff is barred of her dower at all, it is by or under the 20th section of the Dower Act, (Wagn. Stat., 542,) which is the same as the statute of Westminster. (13 Edw. I., 1 C., 34.) By this statute adultery alone would not bar dower. There must also be a voluntary separation by the wife from the husband; she must leave him *sponte*. If the husband go away and leave his wife, then even continued adultery after such separation will not bar the wife of her dower. (Elder vs. Reel, 62 Penn. St., 308, and cases cited; 1 Bish., Mar. & Div., § 628; Graham vs. Law, 6 Up. Can.,

310; Coggswell vs. Tibbetts, 3 N. H., 41; Walters vs. Jordan, 13 Ired., 361; 2 Scribner Dow., 501, § 7.)

II. The case of Stegall vs. Stegall, 2 Brock, [Va.] 256, is not applicable. There the wife refused to go and live with her husband because she had heard he had another wife.

DeFrance & Halliburton, for Respondents.

I. The going away of a woman is not the gist of the cause of the forfeiture, but the living in adultery. (2 Scribner Dow., 498, § 3; 500, § 6.)

II. All the circumstances mentioned in the statute need not concur in form, provided they do so in substance. (2 Scribner Dow., 500, § 6 and n. 3.)

III. Where a woman and her husband voluntarily separate, or she leaves his house on account of his cruelty, or against her consent, or she refuses to go with him to his place of abode, and while living apart she commit adultery, she will forfeit her dower, unless there is a subsequent reconciliation. (1 Wash. Real Prop., [2 Ed.] 196, § 4; 197, § 4; Hethrington vs. Graham, 6 Bing., 135; Reel vs. Elder, 62 Penn. St., 308; 2 Scribner Dow., 500, § 6; 503-4 §§ 10, 11, 12; Woodward vs. Dowse, 10 C. B., [N. S.] 722; Stegall vs. Stegall, 2 Brock. [Va.], 256.)

IV. The case of Reel vs. Elder, *supra*, relied on by the appellant, is very dissimilar from the one before the court. There the husband slipped away from his wife without her knowledge; here she refused to go with her husband. Even that case has only one case to support it; all the other cases are against it.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff instituted her suit in the Adair County Circuit Court asking for an assignment of dower in the estate of her deceased husband. The facts as shown in the bill of exceptions are in brief these: That plaintiff and John McAlister were married in the State of Pennsylvania in the year 1836 or 1837, and that while in that State they resided with plaintiff's step-father; that sometime after the marriage John

McAlister started for Missouri to look out for a home and purchase land; he requested the plaintiff and her step-father to accompany him, but they declined on the ground that they might not be satisfied with the place after they got there, and it was finally determined that he should go alone, and, if he succeeded in purchasing land, he should either come back after them or send for them. The evidence is not precise as to the time, but it seems that some three or four years after the husband's departure the plaintiff committed adultery and had a child born, whose father was one Sawyer, and a few years after the birth of this child she intermarried with one Rommell, by whom she has had a large family of children, and still continues to live with him as his wife. It appears further, that, when plaintiff first committed adultery, and when she contracted her second marriage, she was aware that her first husband, McAlister, was living, and knew where he resided. The land, in which dower is now claimed, was purchased by McAlister and owned by him at his death. The court below held, that plaintiff was not entitled to dower, and she has appealed the case to this court.

The question presented for determination involves the proper construction of the 20th section of the act concerning Dower. (1 Wagn. Stat., 542.)

That section is as follows: "If a wife voluntarily leave her husband and go away and continue with an adulterer, or after being ravished consent to the ravisher, she shall be forever barred from having her jointure or dower, unless her husband be voluntarily reconciled to her, and suffer her to dwell with him." This section is in substance the same as the statute of 13 Edward I. Ch. 34, commonly called the statute of Westminster second, which enacts, that if a wife elope from her husband and continue with an adulterer, she shall be barred of her dower, unless her husband willingly and without coercion of the church reconcile her and suffer her to dwell with him.

In some of the States this English statute is declared to be in force, and in nearly all the others they have similar or like provisions.

At common law adultery was no bar to dower, and by the statute something more must occur to produce that effect. The construction universally put upon the statute is, that an elopement, a voluntary separation or departure by the wife from her husband, as well as adultery, is necessary to make the bar complete. (Co. Litt., 32, 6; 2 Inst., 435.)

There must be an actual separation between the parties, but whether the wife leave her husband with or without his consent, and live in adultery, she will nevertheless forfeit her dower, if there be no subsequent reconciliation between them, (2 Scrib. Dow., 499, § 5 and note.)

The counsel for the appellant have cited *Reel vs. Elder*, (62 Penn. St., 308,) and rely upon it as the strongest case in their favor. In that case it appears, that John Elder and Amelia Dehart were married, and the difference in their social condition made the marriage an unhappy one. About two weeks after the marriage Elder went away clandestinely saying, that he was going to leave his wife and that he did not want her to know any thing about it. He was absent for many years, and afterwards procured a divorce in the domicile where he removed to. This divorce, was, however, declared to be a nullity. During the absence of Elder his wife, remaining in Pennsylvania, committed adultery. After that he returned, met his wife, declared the divorce a nullity, and lived with her for several months. The parties were again separated, and John lived with another woman, and Amelia, the wife, with another man. They were subsequently reconciled, and lived together till John died, and had children born of this latter union.

Upon the case as thus made out, the court decided that the wife was entitled to dower. It is true the court did not base the decision on the ground of final reconciliation, which, it was said, could only become important if the dower had been barred by force of the statute, but it was not considered that the case came within the statute. The language of the court was: "Now there was not only no evidence, that the plaintiff had willingly left her husband, but the proof was direct, positive

and uncontradicted, that he had deserted her. He did not request her to go with him, nor even inform her of his intention. He left her clandestinely on the false pretense that he was going a gunning, and was absent for several years."

In *Hethrington vs. Graham*, (6 Bing., 135,) the statute received a full consideration, and it was there held, that if a woman leave her husband with her own free will, or the parties have separated by mutual consent, and the wife afterwards lives in adultery, that her dower will be forfeited.

"It is contended on the part of the demandant," said Tindal, Ch. J., in his opinion, "that each part of the description of the offense contained in the act must be taken to be cumulative, so that the dower is not barred, unless the wife has left her husband willingly with the adulterer; has gone away with him, and has also continued with him. Whilst on the part of the tenant it is insisted, that it is sufficient to bring the case within the statute, if she has of her own consent left the society of her husband, and after she has so left him committed the act of adultery; and the court is of the latter opinion."

It may be admitted, as the fact is, that in all the ancient precedents the leaving of the husband by the wife is stated to have been with the adulterer. But we think this is not conclusive on the point, for as there can be no doubt that the case is within the statute where all these circumstances concur, so the pleader would of course insert them where the facts of the particular case warranted the insertion.

And, on the contrary, there is direct authority, that all the circumstances mentioned in the statute need not concur in form provided they do so in substance. And this appears more evident by the case of *Sir John Conroy*, cited in 2 Inst., 435, where the plea states, that the wife left her husband in his life and lived as an adulteress with Sir W. Paynel, and the replication took issue that she did not live as an adulteress with the said Sir W. P., wherein the bar was held good, though there was no allegation that she left with the adulterer, and it ought not to be forgotten that Britton, whose book

was published immediately after the framing of this statute, speaking of a writ of dower brought against the heir and his guardian, says: "He may say she has forfeited dower of her husband by her adultery, for she went from her husband to another bed after she had married him, and so forfeited her dower. Now here no mention is made of a leaving of her husband, either willingly or with any particular person, but the plea states only in substance that the wife was living apart from her husband in adultery. The authorities therefore, above referred to, place the forfeiture of the dower upon the fact of a living apart from the husband in adultery, and not upon the circumstances attending the elopement, and, as we think the good sense and reason of the case concur with these authorities, we hold the proper construction of the statute to be, what the words still will warrant, that, if a woman leave her husband with her own free will and afterwards lives in adultery, the dower is forfeited."

So in a recent case (*Woodward vs. Dowse*, 10 C. B., [N. S.] 722.) where the question was elaborately argued, it was held, that a woman forfeits her dower under the statute by adultery without reconciliation, though she originally departed from her husband's house in consequence of his cruelty. In this last case *Miller, J.*, said: "Where a man so conducts himself towards his wife, as to render it unsafe or unreasonable that she should be compelled to live with him, he sends her forth with authority to pledge his credit for necessaries. But still she is bound to conduct herself properly. I must say, I do not think it can be said in this case that the plaintiff's committing adultery was the consequence of the husband's maltreatment or misconduct. It was the result of her yielding to temptation."

The case of *Stegall vs. Stegall* (2 Brock, 256) is almost identical with the one we are now considering. In that case a separation occurred between husband and wife in consequence of the refusal of the wife to accompany her husband to his place of abode. The wife excused herself for the refusal, upon the ground, that her husband was supposed to be married

to another woman, and her parents would not permit her to go with him. After the separation she contracted a second marriage, and lived and cohabited with her second husband for several years.

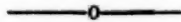
Upon a bill filed by her for dower in the estate of the first husband, Marshall, Ch. J., after referring to the statute, which is substantially the same as ours, said: "So far as respects that part of the provision which relates to the wife's willingly leaving her husband, I think it is satisfied by any separation which is voluntary on her part, and I think any separation voluntary, which is not brought about by his acts or by any restraint upon her person. In this case it does not appear, that her person was restrained, and the authority of her parents ceased on her marriage. Her husband wished her to accompany him and she refused. The separation must therefore be considered as voluntary on her part. The report, that he was married with another woman, does not justify her refusal to accompany him, because it was not true in fact, and she ought not to have acted upon it. But if his real situation was such as to justify separation, it could not justify her subsequent conduct. That was incompatible with the continuance of her claims on him as a husband."

In the present case it is shown, that the plaintiff voluntarily staid in Pennsylvania when her husband came to this State. He wanted her to accompany him, but she refused, assigning as a reason that she might not be pleased with his new home. The separation was not brought about by any act on his part; it must therefore be considered as willingly and voluntarily made on her part. Her subsequent conduct was wholly inconsistent with a continuance of her marital rights, and justly forfeited her claims on her first husband's estate for dower.

Adultery is the main offense which causes the forfeiture. From motives of policy the law has deemed it wise to restrict the forfeiture to cases where the wife lived separate and apart from her husband. It is manifestly wise, if the husband and wife continue to live together till the death of the husband, to let the scene close with his death, and to preclude the heir

from making inquiry as to the conduct of the wife when the ancestor had not complained. But when a separation takes place by mutual consent, or the wife willingly and voluntarily lives apart from her husband, and afterwards lives in adultery, and no subsequent reconciliation takes place, both reason and authority concur in holding, that she is barred from claiming dower in her deceased husband's estate.

I think the court below decided correctly, and its judgment should be affirmed. Affirmed. All the judges concur.



WILLIAM MAGREW Respondent, *vs.* JOHN D. FOSTER, Appellant.

1. *Practice, civil—Sheriff's returns—When amendable.*—Sheriff's returns may be amended at any time during the pendency of the suit, and it is not necessary that anything shall exist on the minutes or records to justify such amendments. They are even amendable at a subsequent term, on a proper state of facts, in support of the judgment.
2. *Practice, civil—Sheriff's returns¹—Contradiction of.*—A sheriff's return, that he has levied on certain property belonging to defendant, cannot be contradicted by the defendant in that suit by showing that he does not own the property.
3. *Practice, civil—Attachment—Defendant, how brought before the court.*—In attachment cases the law necessarily implies, that the defendant may be brought before the court, by personal, or other, service of the summons, if he reside, or can be found, in the State, or the suit may be proceeded in by publication.

Appeal from Adair Circuit Court.

Thos. C. Fletcher, with Glover & Shepley, for Appellant.

I. The defendant was not served with process within the territorial limits of the jurisdiction, but in Scott County. He did not appear. There was no authority to send writs there. (*Fithian vs. Monks*, 43 Mo., 502.) He was not served with the writ; did not appear, and the judgment could be only against the property attached. (1 Wagn. Stat., 188, 189.)

II. The new return of the sheriff was not such an amend-

ment as is contemplated by the statute. (Wagn. Stat., 1034, § 3.) It did not correct a mistake in any respect, and did change substantially the claim of plaintiff. Eighteen months had elapsed, two terms of the court had intervened, since the return of the writ. It was not conformed to the facts. (Webster vs. Blount, 39 Mo., 500; Thornton vs. Miskimmon, 48 Mo., 219.)

III. The levy constitutes part of the record. (Walsh vs. Agnew, 12 Mo., 520.) The reasons for making the new return do not appear of record: It was an entry *nunc pro tunc*, and the reasons for it must appear of record. (Gibson vs. Chouteau, 45 Mo., 171.)

De France & Halliburton, and Barrow & Millan, for Respondent.

I. The sheriff's return cannot be contradicted on a motion to quash an execution, and is conclusive as to the ownership of the attached property. (Kirksey vs. Bates, 1 Ala., 303; Miller vs. McMillen, 4 Ala., 527; Saunders vs. Columbus L. Ins. Co., 43 Miss., 583; Rowan vs. Lamb, 4 Green [Ia.], 468.)

II. The record recites that defendant was duly served with process a proper length of time before court, &c., &c. This is conclusive between the parties. (35 Mo., 233.)

ADAMS, Judge, delivered the opinion of the court.

This was a motion to quash two executions, which had been issued from the Adair Circuit Court on the same judgment to different counties. The judgment was a general judgment, and had been rendered in an attachment suit. The defendant lived in Scott County, and the attachment was issued from the Adair Circuit Court, and levied upon some lands as the property of the defendant situated in that county.

The return of the sheriff, as first made on the writ of attachment, was that he could not find any property of the defendant in Adair County whereon to levy the attachment, and that the defendant was not found in Adair County. At a subsequent term, or rather after two or three terms had elapsed, the sheriff was allowed to amend his return, and did in-

dorse a return as of the date of the first to the effect, that he had levied the attachment on certain lands of the defendant in Adair county, describing them in his return, and that defendant was not found in his county. Afterwards a writ of summons was issued in the case to Scott County, and duly served on the defendant. A judgment by default had been entered before the service of the summons. But this default was disregarded, and another default entered after service of the summons, which was afterwards regularly made final. An execution was issued to Adair County on the general judgment, requiring the attached lands to be first sold, and they were sold, but did not pay the judgment, and then the two executions in dispute were issued.

On the trial of the motion the defendant offered a deed in evidence, purporting to convey to another party the Adair lands that had been attached; but the court rejected the deed, and the defendant excepted. The motion to quash was overruled, and the defendant excepted and has brought the case here by appeal.

* 1. The first point raised is, that the sheriff could not amend his return at a subsequent term. This point must be ruled for the respondent. It has been the universal practice to allow sheriffs to amend their returns at any time during the pendency of the suit; and even after final judgment it may be permitted, on a proper state of facts, at a subsequent term, in support of the judgment. During the pendency of a suit, all the proceedings are considered as in the breast of the court, and proper entries may be made correcting errors at any time before final judgment.

They are not *nunc pro tunc* entries, although they may partake of that nature. It is not required that anything should exist on the minutes or records to justify such entries. The existence of outside facts is sufficient to justify corrections during the pendency of the suit.

2. The defendant had no right to contradict the sheriff's return by showing that the lands attached did not belong to him. (Hallowell vs. Page, 24 Mo., 590; Delinger vs. Hig-

Bowles v. Wathan.

gins, 26 Mo., 180.) Being attached as his property, the plaintiff, or other purchaser at execution sale, would have the right to claim them as such, and to contest the validity of any deed he may have made.

3. Suits by attachment are required to be brought in the county where the defendant's property may be found. (Wagn. Stat., 1005, § 2.) If the defendant has property in several counties, the suit may be brought in either, and counterpart attachments issued to the other counties in aid of the original attachment. In all cases, where the defendant does not reside in the county where the property is attached and the suit instituted, a summons may be issued for him to the county where he resides or may be found. As the law requires the suit to be brought in the county where the property is, it necessarily implies, that defendant may be brought before the court by personal, or other, service of a summons, if he reside in or can be found in the State.

Where the defendant is a non-resident, or cannot be found, and his property is attached, the suit may be proceeded in by order of publication.

There seems to be no error in the record. Judgment affirmed. The other judges concur.

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WALTER BOWLES, Appellant, vs. THEODORE B. WATHAN,
Respondent.

1. *Contracts—Partial performance—Frauds, statute of—Specific performance—Deeds—Undue influence.*—A. made a deed to his daughter B. for certain lands, but retained the deed, showing it to B. and her husband C., saying that she should have it at his death, but he wanted them to come and take charge of the property and live on it. B. and C. came and lived on the property and made improvements, and afterwards, hearing they had no title thereto, requested A. to give them the deed, threatening, in case of refusal, to leave the land. A. finally gave them the deed, but took a conveyance of a part of the land, including the improvements, from them to him for his life. A. afterwards brought suit to set aside his conveyance, on the ground of undue in-

fluence. *Held*, that, if B. and C. had remained on the land till A's death, they could have compelled his heirs to specifically perform the contract and convey the land to B., that A. only did in advance what he intended to do at his death, and that there was no undue influence exerted.

Appeal from St. Charles Circuit Court.

Theodore Bruere and King & McDearmon, for Appellant.

I. The defendant in concealing from plaintiff the fact, only known to himself, that it was almost certain his wife would die in a short time, committed a fraud upon the plaintiff in procuring a deed of gift to his wife, which therefore, contrary to the intention of the grantor, must result and did result to his own benefit. (3 Wh. & Tud. Cas. in Eq., 141, 143; *Huguenin vs. Baseley*, 14 Ves., 299; *Lyon vs. Home*, 6 Eq. Cas. [Law], 655; *Sears vs. Shaper*, 6 N. Y., 268; *Tyler vs. Gardiner* 35 N. Y., 559.)

II. As to what constitutes in law undue influence. (1 Sto. Eq. Jur., 264-271; 3 Lead. Cas. Eq., 125, 127; 9 How., 552; 8 How., 183; 44 Mo., 465; 46 Mo., 147; 48 Mo., 483; 50 Mo., 206.)

III. Deeds executed under undue influence must be set aside. (1 Sto. Eq. Jur., 264-271; 3 Lead. Cas. Eq., 125, 127, 136, 137, 140, 145; 8 How., 183; 44 Mo., 465; 46 Mo., 167; 48 Mo., 483; 14 Ves., 299.)

IV. Very little proof is required when a person is of extreme age, especially when the deed is obtained without consideration. (1 Sto. Eq. Jur., 264-271; 44 Mo., 465; 46 Mo., 147; 48 Mo., 483; 50 Mo. 206;)

V. That the donor is at the time of the gift a member of the donee's family, and residing in the same house, is proof of moral duress and undue influence. (*Poston vs. Gillespie*, 5 Jones Eq., 258; *Taylor vs. Taylor*, 8 How., 183; *Espey vs. Lake*, 10 Hare, 262.)

E. A. Lewis, for Respondent.

I. The deed was in fact effectually delivered immediately after the marriage of plaintiff's daughter, about four years

before the transaction which is here set up as a delivery under "undue influence." (Folly vs. Vantuyl, 4 Halst., 153; Sonverbye vs. Arden, 1 Johns' Ch., 240; Chess vs. Chess, 1 Penn., 32; Scrugham vs. Wood, 15 Wend., 545.)

Orrick & Emmons, for Respondent.

1. Old age of itself does not disqualify a person from making a valid deed, and being *compos mentis* he could legally be a disposer of his property, and his will stands for a reason. (1 Sto. Eq. Jur., 244; 7 Iowa, 60; 23 Wend., 255.)

ADAMS, Judge, delivered the opinion of the court.

This was an action to set aside a deed, upon the alleged ground that it had been obtained by undue influence exercised by the defendant and his deceased wife over the mind of plaintiff. The answer denied all the material allegations of the petition. After a final hearing, the court dismissed the petition, and from this judgment the plaintiff has appealed to this court. The leading facts are about as follows: The plaintiff is eighty-three years old. In 1865 he made a partial distribution of his property. To each of his children he gave a deed for certain lands. The defendant's wife was his pet child, and he made a deed of his homestead to her, but retained it in his possession, and intended to retain it till his death. The defendant lived in Kentucky, and married this pet child in 1866, and the morning after his marriage the plaintiff exhibited the deed he was holding for his wife, and told him they should have that property at his death, and he wanted them to come and take charge of the place and live on it. The defendant replied, that he had an engagement in Kentucky, which would detain them for one year, and that, as soon as his engagement expired, he would return with his wife, and at the expiration of his engagement he did return with his wife and took possession of the premises, and remained there making improvements, etc., for several years. After being there for some time, he and his wife learned that it was claimed that they had no more interest in the premises than the other children; and the defendant's wife commenced

importuning the plaintiff for the delivery of the deed. They threatened to remove from the place unless the deed should be delivered. The plaintiff resisted for some time, but finally compromised the matter by delivering the deed and taking back from the defendant and his wife a deed for a part of the land for life, including the improvements. In the course of six months or so, the defendant's wife had a child, and died in her confinement. Before her confinement she made a will in favor of her husband and the child with which she was then *enciente*, devising the land covered by the deed in dispute to them. A short time after its birth, the child also died, leaving the defendant as the only heir at law. After the death of the child, the plaintiff complained that the deed in dispute was obtained by undue influence exercised over him by his daughter and her husband. At the time of the delivery of the deed, he shed tears, but had received a letter from one of his children, and the witness did not know, whether it was the delivery of the deed, or the news in the letter, that caused him to weep. These are the main facts as detailed in the evidence. It is manifest, from the evidence, that in delivering the deed the plaintiff was performing an act in advance, which he had all the time intended to have legal efficacy at his death. The defendant had taken possession of the premises and erected improvements and performed labor, under the assurance that the property should belong to his wife at the death of the plaintiff. If the defendant had remained on the place until the death of the plaintiff, under the contract which he had made with the plaintiff, he would have been legally entitled to a specific performance of the contract. (See *Halsa vs. Halsa*, 8 Mo., 303.) The contract in the case of *Halsa vs. Halsa* was in writing, but the only consideration was precisely the same as the one under review. When the purchase money is paid and possession taken and improvements made under a verbal contract to convey land, such acts remove the case from the statute of frauds. In delivering the deed in question, the plaintiff was only doing in advance what the law would have compelled his heirs

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to do after his death. Under the circumstances, the death of the wife would not have made any material difference. The child would have inherited the estate from its mother, and the defendant from his child. The evidence fails to show any undue influence in procuring the deed. The plaintiff showed ample mental capacity. He resisted their importunities, and would not yield until he was provided for with a home for life. There seems to be no case for setting aside this deed on account of undue influence exerted by the defendant and his wife over the plaintiff.

Judgment affirmed. The other judges concur.

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MARTIN L. REID, Respondent, *vs.* JOHN B. PORTER, *et al.*,
Executors of W. T. PORTER, Appellants.

1. *Executors—Wills—Direction to support family of testator—Supplies furnished—Suit for.*—A. by his will directed his executors to support his family till his estate should be divided. B., a merchant, sold certain supplies to the widow, and sued the executors therefor. *Held*, that to allow such a suit would subvert the will of the testator, who confided in his executors to furnish the family with reasonable funds; that if they failed to do so, they could be compelled to perform this duty by a court of equity, perhaps by the Probate Court itself.

Appeal from Adair Circuit Court.

Barrow & Millan, and Ellison & Ellison, for Appellants.

I. The claim presented is not a demand against the estate, of the deceased. (*Hailey vs. Wheeler*, 4 Jones [N. C.], 159; *McKay vs. Royal*, 7 Jones, 426; *Gregory vs. Hooker*, 1 Hawk. [N. C.], 394; *Farrar vs. Dean*, 24 Mo., 16; *Lorin vs. Olinger*, 12 Ind., 29.) Where the cause of action arises after the death of a party, no suit can be maintained on it so as to change the estate. (*Mills vs. Kuykendall*, 2 Blackf., 47.)

II. If the executors should refuse to furnish the support, the cause of action would not be against the estate, but against them personally by attachment, or any other way by which the jurisdiction of the court is enforced.

Harrington & Cover, for Respondent.

I. If the defendants pay the account of plaintiff, the Probate Court, in making their settlement of the estate, must allow them a credit for all necessities furnished the family; if the deceased himself were living, he would be liable for necessities suitable to his circumstances and the condition of his family.

WAGNER, Judge, delivered the opinion of the court.

This is an account, filed in the Probate Court of Adair county, for thirty four dollars and forty cents by the plaintiff, for goods furnished the widow and family of W. T. Porter. The case was tried in the Circuit Court, having been removed there because one of the executors sued was a judge of the Probate Court.

The account was for some articles of clothing furnished by plaintiff, who was a merchant.

There was no dispute, that the articles were furnished, nor any controversy about the reasonableness of their price. The only question is, whether the executors were liable, and this liability is based on a clause of the will, which provides, that they shall provide for the support of the widow and children, thus: "It is my will and desire, that, until distribution of my estate shall be made according to item No. 9, my executors provide for the sustenance and support of my wife, A. C. Porter, and my two daughters (naming them), or such of them as shall survive me; said support and sustenance to be out of my estate, and my executors are authorized and empowered to dispose of property, upon the terms to all intents and purposes as specified in item second, for that purpose."

It appears that the executors made arrangements with several merchants, authorizing them to supply necessities both of food and clothing; though this is not a matter of any importance in the decision of this case.

The important question is, passing by the small amount in controversy, whether a third person, other than the executors,

can assume to determine upon the necessity or propriety of the purchases made. The claim is not one against the estate of the deceased, clearly, unless it is so by reason of the trust conferred on the executors. The enforcement of this trust is not confided by our laws to the Probate Courts, nor could it be enforced in any court by a proceeding of this sort.

It was a trust confided in the executors. If they failed or refused to discharge it, a court of equity, perhaps the Probate Court itself, would compel them to perform their duty.

To hold however, that the widow and children could contract debts to any amount, and that their creditors could force the executors to pay them, would be to subvert the will of the testator, who confided in his executors to furnish them with reasonable funds for this purpose.

Without regard to the form of this proceeding, there was an assumption that the executors had not done their duty. Upon that assumption the liability enforced in this case was based.

The judgment is reversed. The other judges concur.

—o—

JESSE J. FITCH, Appellant, vs. JACOB G. GOSSER, Respondent.

1. *Practice, civil—Actions—Leased land—Trespass to—Who can sue.*—The owner of land can bring an action against a trespasser for cutting timber on it and carrying it away, though the land is then in the possession of his tenant.
2. *Lands and land-titles—Misdescription in deed—Subsequent deed correcting—Titles, equitable and legal.*—Land was conveyed to A. but it was misdescribed in the deed. By a subsequent deed this mistake was corrected. *Held*, that the first deed gave him an equitable title, which the second deed perfected into a legal title.
3. *Lands and land-titles—Equitable title—Possession—Farm—Timber-land.*—A. having an equitable title to 200 acres of land, consisting of a prairie-farm of 160 acres, and 40 acres of timber-land a mile or two away from it, leased the farm to tenants, allowing them to cut timber for the use of the farm and fire-wood from the 40 acre tract. *Held*, that the only value of the timber-land was in its use for such purposes, that it was not designed for cultivation or inclosure, and that A. was in possession of both tracts.

*Appeal from Schuyler Circuit Court.**Edward Higbee* for Appellant.

I. The deed executed by Thatcher to plaintiff, which purports to be executed to correct error in former deed, operates by relation from the date of the deed from Thatcher to Orr, containing the erroneous description. (3 Washb. Real Prop., [1868] 276, § 46.)

II. At the time the trespass was committed, defendant was a mere trespasser and not in possession, while plaintiff was the equitable owner in fee and entitled to the legal title.

III. A landlord may recover damages for an injury done to the inheritance by a trespasser while in possession of a tenant.

McGoldrick and Caywood, for Respondent.

I. Plaintiff must show such title or possession in himself as would enable him to recover, which must exist at the commencement of the suit, and, if by possession, it must be actual, and cannot be presumed to exist upon the evidence of a quit-claim deed, even though it relates back. (2 Greenl. Ev., § 619; 34 Mo., 417.)

NAPTON, Judge, delivered the opinion of the court.

This is termed in the pleadings an action of trespass; though it might, with more propriety, if we are to go back to common law phrases, be called an action on the case. The complaint is, that the defendant entered on the N. E. qr. of the S. W. qr. of section 2, Town. 65, R. 15 West, wrongfully, and without the consent of the plaintiff, who claims to have been the owner, and cut timber, and carried it away, to the value of two hundred dollars.

The answer denies the wrongful entry, claims that defendant was in possession at the time of the trespass by virtue of a tax deed from the collector of the county, and denies that plaintiff was the owner of the land when the alleged trespass was committed.

A replication was filed, which denies defendant's possession,

and then proceeds to assert that the tax-deed was void for various reasons particularly specified. It is unnecessary to recite these reasons, as the court held the defendant to have no title by reason of the tax deed.

The plaintiff is a citizen of Virginia, and in 1856 bought this land from one Thatcher, in connection with 160 acres of prairie-land lying a mile or two from it. The 40 acre tract was timber. The deed of Thatcher and wife to one Orr was given in evidence; there was a mistake in this deed in the number of the township. There was then a deed from Orr to plaintiff in 1858 which contained the same mistake. There was then a deed made in 1870 by the original owner, Thatcher, directly to plaintiff, correcting the mistake in the number of the township. Thatcher, Orr and Fitch, the plaintiff, all lived in Virginia, and are still non-residents of Missouri, so far as the record shows.

It appears from the evidence, that the defendant cut rail-timber, saw-logs, &c., between 1868 and 1870, from this 40 acre tract; that as early as 1862 the plaintiff through an agent rented the prairie farm to various tenants, allowing them to cut timber on the 40 acre tract for rails to be used on the farm and for firewood; and at the time the defendant cut the timber, the farm was in possession of one of these tenants. The taxes were regularly paid on the land, except in the year the 40 acre tract was sold for taxes to defendant, and the agent redeemed it from that sale within two years after, and procured a certificate of redemption.

The defendant knew the land belonged to plaintiff when he bought it for taxes, as it was assessed as plaintiff's land.

The tax deed, however, cuts no figure in the case, as it was excluded by the court. The court found for the defendant, and declared the law to be, that the deed from Thatcher to Orr did not convey the legal title to the 40 acres in question, and that the deed from Orr to plaintiff did not, and that the deed from Thatcher to plaintiff, correcting the mistake in the first deed, did not relate back to the date of the original deed, so as to give plaintiff a right to maintain trespass for cutting

timber on said land prior to the execution of the last deed, unless plaintiff was in the actual possession of said land.

The court also declared, that no such actual possession was proved, and said that possession of one tract of land without a legal title, although under claim of title, does not operate to give to the person so in possession constructive possession of another tract disconnected from the one he may be in possession of, if he has no legal title to the tract of which he has actual possession, although he may have claimed the same as his and paid taxes thereon for years.

The court further declared the law to be, that the landlord cannot maintain an action of trespass for trespass committed on the premises whilst in the possession of his tenants.

At the common law an action by the owner of land for injuries to the inheritance, when the land was rented to tenants, was called an action on the case. The tenant could bring trespass for an injury to his possession. This suit, by whatever name it may be called, is for a damage sustained by the owner, and is therefore properly brought by him.

The plaintiff was the owner of this land in 1858. It is true, that, by a mistake in the conveyance of the proper number of the township, he might be regarded as merely the owner of the equitable title. But he had an equitable title beyond controversy, which subsequently was perfected into a legal title, and he had the actual possession from 1862, by his tenants.

The tract conveyed to him was 200 acres—160 of which was in the prairie, and of course was the part occupied and cultivated; but the detached 40 acres of timber was as much in his possession as the 160 acres in the prairie.

What possession of a piece of timber land, bought to support a farm in the prairie, is necessary? Its only value is, that it supplies fencing timber and firewood to the farm. What possession is possible to be established in such cases, where the timber-land is never designed for cultivation? The proof here is, that the tenants were allowed to make rails on it, but only to keep up the farm, and they were allowed to cut fire-wood.

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If the legal title to the 40 acres had been in plaintiff, there would have been no question. As there was a mistake in the deed, of the number of the township, the title of the plaintiff may be considered only an equitable one.

But this equitable title was accompanied by possession. We consider a person in possession of a farm of 160 acres in the prairie, with a forty acre tract a mile or two off in the timber, claiming both, as much in possession of one as the other. This timber-land is not designed for cultivation or inclosure.

The judgment will therefore be reversed and the cause remanded. The other judges concur, except Judge Adams, who is absent.

—o—

THOMAS HUFFARD, Appellant, *vs.* WILLIAM GOTTBERG, Respondent.

1. *Mortgages and deeds of trust—Sales under—Disposition of proceeds.*—When a mortgage or deed of trust is given on property to secure the payment of notes maturing at different times, and the property, or a part thereof, is sold in accordance with the deed to satisfy one of the notes, the overplus, after satisfying the expenses of the trust and that note, must be held by the trustee subject to the same lien as the property was, even though the deed is silent as to the disposition of the overplus, and does not state that default in one note shall cause the others to become due and payable.

Appeal from Cape Girardeau Court of Common Pleas.

Lewis Brown, for Appellant.

I. The notes under the mortgage are to be paid in the order they became due; and under this mortgage the mortgagee had no right to sell on the 4th day of May, 1872, to pay the note or any part of it due on the first day of January, 1873.

II. The parties to a mortgage have the right to agree upon the terms of a power of sale of mortgaged premises, and where the sale takes place upon such terms as the parties were com-

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petent to agree upon, and is faithfully and fairly executed, the courts will not interfere. (*McNees vs. Swaney*, 50 Mo., 388, citing *Dobson vs. Racy*, 4 Seld., 216; *Elliott vs. Woods*, 45 N. Y., 71; *Reddick vs. Gressman*, 49 Mo., 389; *Allen vs. Ransom*, 44 Mo., 263; *Thornton vs. Irwin*, 43 Mo., 153.)

Louis Houck, for Respondent, filed an elaborate brief, but it is necessarily omitted, the court not having considered the propositions argued therein.

ADAMS, Judge, delivered the opinion of the court.

The plaintiff executed to the defendant his ten promissory notes, of three hundred dollars each, to become due in the following order, to-wit: the first of January, 1872—1873—1874—1875—1876—1877—1878—1879—1880—1881; each bearing interest at eight per cent. per annum payable annually, and if not so paid to become principal and bear the same rate of interest. To secure these notes he and his wife executed a mortgage to the defendant on several tracts of land, situated in Cape Girardeau county. The mortgage provided, that if the plaintiff should fail to pay said notes or either, of principal or interest, as the same became due and payable, the said defendant, his heirs, executors, administrators or assignees might proceed to sell the property therein described, or any part thereof, to satisfy what might be due on said notes, or either of them, of principal or interest, at public vendue to the highest bidder for cash in hand.

The mortgage further provided, that the defendant, his heirs, executors, administrators or assignees, might bid for and purchase any part of the property, provided the sale be conducted fairly and in accordance with the provisions of the mortgage.

It was further provided, that the proceeds of sale should be applied, first to pay the expenses of the trust, and next whatever might be in arrear and unpaid on said notes or either, of principal or interest, and the residue, if any, should be paid to the plaintiff or his personal representatives.

The first note, falling due on the 1st of January 1872, was

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not paid, and after it became due the defendant, as mortgagee, according to the terms of the mortgage advertised the property for sale; and at the sale the property was cried off by the sheriff as auctioneer, and the defendant, as mortgagee, bid one piece of the land off, being the only piece sold, at the sum of sixteen hundred and fifty dollars—and the plaintiff has brought this suit, demanding the overplus of this sum of \$1650, after payment of the expenses of the sale and the note due January 1st, 1872, and the interest thereon, which overplus is claimed to be \$1250.

The case was tried by the court, and resulted in a judgment for the defendant. There was an agreed statement of facts, which showed, that the defendant did not intend to make a purchase of the property at the alleged sale, but only bid it off to prevent a sacrifice.

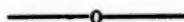
Declarations of law were given on both sides, and exceptions saved by the plaintiff, who has appealed to this court.

Under the view I have of the case, it is unnecessary to pass on anything that occurred at the trial.

The plaintiff's petition shows that he has no standing in court. It was not the intention of the parties to the mortgage, that the mortgagee was to surrender any part of his security by a sale of the mortgaged premises, or any part thereof. The true construction of the mortgage, in regard to the disposition of the proceeds of any sale that may be made, is, that the expenses of the trust are to be first paid, and then the notes and the interest thereon in the order as they become due. Within the meaning of the mortgage, all that have not been paid off, whether they have matured or not, are in arrear and unpaid, and no part of the proceeds can be paid to the mortgagee till all the notes and interest shall have been fully paid. It was not contemplated by the parties, that a sale of the premises should destroy the security for the notes not due. If there was nothing in the mortgage indicating the entire disposition of the proceeds of a sale, the trustee would still hold them for the security and payment of the whole indebtedness. This would be clear beyond dispute

if there had been a single piece of property, and it had sold for more than would pay the matured note or notes. Would it be just or equitable, that the overplus in such case should go back into the hands of the mortgagee? What right has he to the overplus, when his debt still remains unpaid, and the whole property, and not a part of it, was mortgaged to secure the entire indebtedness? The overplus must be held subject to the same lien as the property was, from which it was derived.

Let the judgment be affirmed. The other judges concur.



STATE OF MISSOURI, Respondent, *vs.* CHRISTOPHER BURNS,
Appellant.

1. *Practice, criminal—Continuances.*—Applications for continuances are addressed to the sound discretion of the court trying the cause, and an appellate court will not interfere, unless such discretion appears to have been used unsoundly or oppressively.
2. *Practice, criminal—Continuances—Affidavits—Due diligence.*—Where an affidavit was filed for a continuance in a criminal cause on the ground of the absence of witnesses, and it appeared that three continuances had been granted, and that the only subpoenas issued were issued on two occasions two days before the cause was set for trial, and the witnesses were not found: *Held*, that due diligence had not been exercised.
3. *Practice, criminal—Continuances—Newly discovered witnesses.*—An affidavit for a continuance, on the ground of the absence of parties discovered to be witnesses just prior to the trial, should be examined with rigid scrutiny.
4. *Practice, criminal—St. Louis county—Venire from the county—How summoned.*—The jury act for St. Louis county is peculiar, and does not contemplate the summoning of a jury from the county, consequently in a criminal cause it is competent for the marshal to summon such a jury, without receiving a list of the jurors from the jury commissioner.
5. *Practice, criminal—Application for change of venue—When applied for.*—An application for a change of venue in a criminal cause comes too late when the cause is called for trial, no previous notice having been given of the proposed application.

Appeal from St. Louis Criminal Court.

C. P. Johnson, for Appellant.

State v. Burns.

I. The court erred in overruling the motion for a continuance. The record shows clearly that the defendant has been affected injuriously by being deprived of the evidence which he would have obtained by further continuing the cause. (State vs. Klinger, 43 Mo., 127; McKay vs. State, 12 Mo., 492; McLane vs. Harris, 1 Mo., 700; Riggs vs. Fenton, 3 Mo., 28; Moore vs. McCulloch, 6 Mo., 444; Tunstall vs. Hamilton, 8 Mo., 500; Darne vs. Broadwater, 9 Mo., 19; State vs. Schoenwald, 31 Mo., 147.)

II. The challenge and objections, made by defendant to the entire panel of jurors summoned to try said cause under the special venire ordered by the court, should have been sustained. (Sess. Acts 1855, p. 96, § 17.) The general statute law relative to the qualifications and summoning of jurors does not apply to a criminal cause. (Wagn. Stat., 800, § 23.) The general law, governing courts having criminal jurisdiction in summoning jurors, is set forth in Wagn. Stat., 801, §§ 29, 30, 31, 32; 1102, §§ 7, 8. The provisions of the law relative to St. Louis county are such that the jury commissioner can easily supply such venire as contemplated. (Laws St. Louis Co., p. 217, § 3.)

III. The defendant was entitled to a hearing on his application for a change of venue made to the Circuit Court, and a decision thereon, before being put to his trial. (Laws of St. Louis Co., p. 1, § 2.)

J. C. Normile, for Respondent.

I. This court will not ordinarily interfere with the discretion of the lower court in ruling on motions for continuance. (Green vs. State, 13 Mo., 382; State vs. Klinger, 43 Mo., 127; Frederick vs. Rice, 46 Mo., 24.)

II. The Jury Act of St. Louis county (Laws of 1872, p. 214), makes no provision for summoning special juries, hence when a special venire is demanded, the jury must be summoned under the provisions of the general statute.

III. The petition for a change of venue does not disclose when the prejudice of the judge became known to defendant.

There was no reasonable notice to the Circuit Court attorney of the intended application. (State vs. Reed, 11 Mo., 379; Perry vs. Roberts, 17 Mo., 36.)

IV. It does not appear from the record that the Circuit Court ever acted on the application; nor is there anything to show why the Criminal Court should stop its proceedings.

WAGNER, Judge, delivered the opinion of the court.

The defendant, in conjunction with one Barrett, was indicted in the Criminal Court for committing a rape upon the person of one Marie Meurer, a female about fourteen years of age.

At the trial he was found guilty, and sentenced to a term of ten years in the penitentiary. No objections are made to the instructions as given by the court, nor to any other rulings, except as hereinafter mentioned.

The first point raised is, that the court erred in refusing a continuance. The indictment was presented to the court by the grand jury on the 22d day of November, 1872, and on the 27th of the same month the defendant was arraigned, and pleaded not guilty. On the 9th day of December thereafter, the case being docketed and set for trial, the defendant obtained a continuance of the cause to the January term, 1873, on account of the absence of Miller, McCarthy and Grady, who were alleged to be witnesses material for the defense. At the January term, 1873, the defendant obtained a second continuance upon his affidavit, because Miller was absent. This continuance was to the March term of the court. On the 11th day of April, it being of the March term, defendant filed his motion, accompanied by an affidavit, asking for a further continuance.

The grounds set forth in this affidavit were that Miller, Grady, Campbell and Chapman, material witnesses, were absent. This motion was by the court overruled. The case was set for trial on the 12th day of March, and on that day the cause was regularly called up for trial, and at the defendant's request it was laid over till the 8th day of April. The

case was then called on the 11th day of April, when the motion and affidavit for a continuance was made. In the affidavit the defendant states, that on the 10th day of March he caused subpoenas to be issued for the witnesses, Miller and Grady, and on the same day placed them in the hands of the officers; that the officers failed to find the witnesses, and returned the subpoenas accordingly; that when the cause was laid over till April, on the 8th day of that month he caused subpoenas to be again issued for the same witnesses, and that the officer made a similar return. It is then alleged in the affidavit, that both of the witnesses are residents of the city of St. Louis; that Grady resides with his parents, and was in the city till within a few days previous to the time of making the affidavit, and that his absence was but temporary. It is further stated, that after the 8th day of April the affiant was informed, that Miller had gone to Belleville, Ills., and was engaged at work there in a nail mill, and that he had been so engaged for several months without defendant's knowledge or consent.

In reference to Campbell and Chapman it is stated, that the subpoenas were not issued for them till the 8th day of April, when the trial was set for the 11th of that month, but it is alleged, as an excuse for not trying to obtain their attendance earlier, that what they knew about the case was not communicated to the defendant any sooner.

It will be observed, that the first continuance was granted to the defendant simply on his motion, the second was upon affidavit, but does not appear to have been resisted, and a third continuance was then asked for. It was surely necessary, that by the third term the defendant should have used proper diligence to have prepared for trial. Now the cause was set for trial on the 12th day of March, and yet no subpoenas were issued for the witnesses till the 10th day of that month, giving the officer not more than two and, perhaps, but one day in which to hunt up the witnesses. This was absolutely no diligence. Why were not subpoenas issued immediately after the last continuance was granted, in order that

the officers might have sufficient time to hunt up and procure the witnesses? The affidavit admits, that Grady was in the city till within a few days of the issuing of the subpoena; had ordinary diligence then been used, it is evident that he might have been served. As to Miller it is stated, that he had been for several months in Belleville, which is only sixteen miles from St. Louis. Had any inquiry been made, it is manifest that the place where he was at work could have been discovered, and his attendance procured, or his deposition taken. The same remarks will apply in reference to the subpoenas issued on the 8th day of April. As to the witnesses, Campbell and Chapman, they never seem to have been known or heard of till three days before the day set for trial. It is not shown, that their materiality could not have been ascertained at a sooner period. The affidavit as to them came with marks of suspicion. In all the prior proceedings they were never thought of, and a party might postpone a trial indefinitely if the precedent were established, that a continuance would be granted upon the discovery of new witnesses just prior to the trial. We certainly would not be understood as deciding, that no case could be made in which a continuance for such a cause would be improper; but what we do say is, that applications of that kind should be examined with rigid scrutiny.

Again, the only reason, why these two last witnesses were desired, was that they might impeach and contradict certain evidence, which it was anticipated would be given for the State, and which the record shows was not given at the trial. Their presence then would have been useless, and the defendant was not injured by the action of the court, so far as they were concerned.

It is the well settled doctrine, that a motion to continue is addressed to the sound discretion of the court trying the cause, and that an appellate court will not interfere with the exercise of such discretion, unless it appears to have been used unsoundly or oppressively. From all the facts and circumstances shown here, we do not think the court exercised

its discretion either unsoundly or oppressively. It had a right to presume, and was abundantly justified in presuming, that the motion was made merely to obtain delay, and hence there was no error in overruling it.

Second—It is further contended, that the Criminal Court committed error in impaneling the jury. On the 11th day of April, the day on which the cause was up for trial, the defendant filed his motion, supported by affidavit, asking that a special venire be issued for jurors residing outside of the city of St. Louis, on the ground that the minds of the inhabitants of the city were prejudiced against him to such an extent, that he could not get a fair trial from a panel of the inhabitants of the city. On the same day the motion was sustained, and a venire was issued to the marshal for thirty-six jurors outside of the city to serve upon the trial of the cause.

When the marshal made his return on the next day, the defendant then objected, that the panel, as summoned, had not been delivered to him forty-eight hours before the trial, and thereupon the court, admitting the validity of the objection, postponed the trial till he had had the panel in his possession the requisite time.

When the court again assembled the defendant filed his challenge to the special panel of jurors which he had prayed for, and which had been granted at his request, on the ground, that the names of the jurors summoned had not been furnished to the marshal by the jury commissioner, and that therefore the entire panel was illegal. This motion the court overruled.

The jury system for St. Louis county is special and differs from the general law prevailing elsewhere in the State. By the Act of March 3d, 1857, to provide a jury system for St. Louis county, it is made the duty of the jury commissioner, at certain periods of each year, to obtain and take down the name and residence of each person qualified for, and subject to, the performance of jury duty, and to deposit and draw these names in a certain manner for the purpose of furnishing jurors for the different courts.

This law was evidently intended to equalize jury service as far as possible; it is special in its character, and was only intended to apply to the ordinary requirements of the different courts. It does not appear, that the jury commissioner has any facilities for drawing a jury exclusively from the country, as was demanded in this case. He might not be able to obtain a jury at all, for as the principal population is in the city, the names of most of the jurors must necessarily be included therein, and it might be that all of the county jurors on his list had been previously exhausted. At all events, we are clearly of the opinion, that the law never contemplated, and therefore, made no provision for cases of this kind. The inevitable result then followed, that, when a special venire was asked for, it had to be summoned according to the requirements of the general law. Such was the course pursued.

The only remaining point is the action of the court in refusing to grant a change of venue. The record shows, that the case was called for trial at the hour of twelve o'clock, and the State announced itself ready for trial. The court then took a recess for about one hour. At the expiration of that time, and after the assembling of the court, and when some of the jurors had been called, an attorney for the defendant appeared and read to the court a copy of a record and notification from the St. Louis Circuit Court to the judge of the Criminal Court, stating that there was an application to that court for a change of venue. The certificate of the clerk of the Circuit Court states, that the application had been made to that court, that its consideration had been postponed to another day, and it was ordered, that the judge of the Criminal Court be notified thereof. The judge declined paying any attention to the notice, and proceeded with the trial.

The law does not permit changes of venue from the St. Louis Criminal Court to any other county, but provides, that when any person desires a change of venue from that court, that he shall present his affidavit to a judge of the Circuit,

Court, first giving reasonable notice to the adverse party, and that the judge shall immediately hear such evidence as the parties may respectively introduce, and shall determine the existence or non-existence of the facts stated in the petition for a change, and if he be of opinion that the facts set forth in the petition are true, he shall state the same in writing, and issue his warrant directed to the judge and clerk of the Criminal Court, commanding them to transfer the cause to the Circuit Court. (Laws of St. Louis County [Ed. 1872] pp. 92, 95.)

It must be apparent at first blush, that there is no force in the objections here presented. It was not a reasonable notice to notify the circuit attorney of the intended application just as the trial had commenced, and this court has decided, that an application for a change of venue is properly overruled when not applied for until the cause is called for trial—no previous notice having been given of the application. The application is defective in not stating at what time the supposed prejudice of the judge first came to the knowledge of the defendant, as an excuse for not presenting it sooner. Moreover the law did not justify or direct the Criminal Court to discontinue proceedings till an order was made by the Circuit Court transferring the cause. The order was not made, nor does it appear that the Circuit Court has ever acted upon the application.

We have now examined all the objections raised, and find them entirely untenable. The trial seems to have been fair and impartial throughout. The jury upon sufficient evidence found the defendant guilty, and we have neither the right nor the disposition to relieve him from the penalty of his crime.

With the concurrence of the other judges, the judgment will be affirmed.

ELIZABETH GRIFFITH, Plaintiff in Error, *vs.* RICHARD CANNING, Executor of estate of WILLIAM GRIFFITH, deceased, Defendant in Error.

1. *Dower—Wills—Election, effect of—Statutes, construction of.*—If a widow elects not to take under her husband's will, but to be endowed in her husband's estate under § 5, (Wagn. Stat., 539) she, as a distributee, must wait the final settlement and adjustment of the estate, and is not entitled to the allowance of \$400 provided for in §§ 35, 36, 37, Wagn. Stat., 88.

Error to Clark Circuit Court.

James Hagerman, for Plaintiff in Error.

I. The election of the plaintiff to take under the statute "was simply in lieu of her rights under the will."

II. If the widow takes under the will, she is entitled, in addition, to the four hundred dollars absolute allowance provided by §§ 35, 36, 37, Wagn. Stat., 88.

III. The widow's right to this allowance does not depend on the election or non-election. She has it, if there is no will. She has it, if there is a will and she takes under it. She has it, if she elects to take one-half when there are no children. The absolute title passes to the widow by operation of law at the death of the husband. (*Hasting vs. Myers*, 21 Mo., 519; *Bryant vs. McCune*, 49 Mo., 546.)

IV. She rejected the will and elected to take under the 5th section one-half, subject to debts. This was in lieu of dower in real estate under the 1st section, but not in lieu of the four hundred dollars absolute allowance under section 35 of Administration Law. (Wagn. Stat., 88.)

V. The statutes of Dower and Administration must be construed together. They are not in conflict. The absolute allowance is *in addition* to all the rights of the widow under the Statute of Dower.

E. R. McKee, for Defendant in Error.

I. When the widow elects to take under the 5th section of the Dower Law, she assumes another and different relation than that of a widow to the estate of her deceased husband, she then becomes a *quasi* heir, and her rights in, and to, the property are the same as those of an heir.

II. The claim under the Administration Law is utterly inconsistent with the terms of the election under the Dower Law.

SHERWOOD, Judge, delivered the opinion of the court.

William Griffith, the decedent, by his last will bequeathed to his widow, Elizabeth Griffith, one-third of all his lands during her natural life, and one-third of his personal or mixed property absolutely subject to the payment of his debts, &c.

The residue of his estate was devised to his adopted son, William Griffith Lee.

The widow refused to accept the provisions of the will, and filed her declaration under sec. 5, chap. 47, 1 Wagn. Stat. 539, whereby she made her election to be endowed of one-half the real and personal estate belonging to her husband at the time of his death absolutely; subsequently she applied to the Common Pleas Court of Clark County (a court having probate jurisdiction), asking for an allowance of \$400 under secs. 35 36 and 37 of ch. 2, Art. 2, 1 Wagn. Stat.

This application was granted, and the executor ordered to pay to the widow the sum applied for, and from this order an appeal was taken to the Circuit Court, where the application, which was granted by the lower court, was denied, and a declaration of law, to the effect that the widow was entitled as she claimed, was refused.

It appears from the agreed statement of facts, that Griffith died in August 1872, leaving no children; that there was about \$700 worth of personal property, which was sold and converted into money by the executor, and that the widow had never received anything from the estate of her husband, except a small amount of money, provisions and personal property, to which she was entitled, under secs. 33 and 34 of Art. 2 above referred to.

The precise point presented by this record has never been before this court.

In *Cummings vs. Cummings*, 51 Mo., 261, it was held, that the widow was entitled under secs. 35, 36, and 37, *supra*, to \$400 worth of personal property, or its equivalent in money

in case the property had been sold, provided the application was made prior to its distribution or payment for debt. But there is this marked difference between that case and the one under consideration : there, no election had been made by the widow ; here the widow renounced the provisions of the will, and elected to take one-half of the real and personal estate of her deceased husband. The effect of that election was to totally change the attitude of the widow toward her husband's estate. Thereby she ceased to be doweress, and became as to personality only an ordinary distributee. And a brief examination of secs. 35, 36 and 37, under which she made her application, and of secs. 5 and 7, will conclusively show this.

If no election be made, the widow is entitled to the property as her absolute right under secs. 35 and 36, as it is expressly provided in the latter section, that "the property so delivered shall in no case be liable for the payment of the debts of the deceased."

But if the widow makes her election, as provided for in section 5, the effect is to subject the property so chosen to the payment of the husband's debts. As doweress, she is entitled to the property, as part of her dower, immediately and absolutely unfettered by conditions or restrictions. (*Hastings vs. Meyer, Admr.*, 21 Mo., 519.) As distributee she must await the final settlement and adjustment of the estate, just like any other distributee, for the effect of an election, whether it be concerning realty or personalty, is equally as effectual in changing the *status* of the widow ; otherwise, as was well said in *Wigley vs. Beauchamp*, 51 Mo., 544, "It would seem to be little else than a useless and meaningless ceremony." (*Matney vs. Graham*, 50 Mo., 559.)

For these reasons, there was no error in the action of the court below in refusing to give the instruction prayed for by the plaintiff, and, with the concurrence of the other judges, the judgment will be affirmed.

 Owen, et al. v. Brockschmidt, et al.

ELLEN OWEN, *et al.*, Respondents, *vs.* J. F. BROCKSCHMIDT, *et al.*, Appellants.

1. *Practice, civil—Trial—Witnesses—Husband and wife—Statute, construction of.*—The wife is a competent witness in a suit, when she is the real, and her husband only a nominal, party in interest (Wagn. Stat., 519-20, § 2).
2. *Statute, construction of—Death of child, damages for—Pecuniary loss—Funeral expenses.*—Under the statute (Wagn. Stat., 520, § 4), the damages for the killing of one's child are not restricted to the mere pecuniary loss. Such construction would make the words—"having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect, or default"—wholly meaningless. Also the funeral expenses of the child are a part of the damages.
3. *Agency—Liability of principal.*—Authority to purchase wheat necessarily implies and includes authority to give directions as to its delivery.
4. *Damages—Satisfaction—Acceptance of judgment against one tort-feasor.*—The acceptance of a verdict and judgment against one tort-feasor is not conclusive evidence of a compromise of a claim for damages, and should be left to a jury under proper instructions for their decision.

Appeal from St. Louis Circuit Court.

Stewart & Wieting, for Appellants.

I. It was error to admit the testimony of Mrs Owens. Her husband was a party to the suit, and she was clearly incompetent. Her husband can collect and is entitled to receive every dollar of this money, and thus his wife is allowed to swear money into his pockets, in defiance of the principle that a "wife cannot testify for her husband."

II. The instruction, that the jury are limited to the actual pecuniary loss of the mother, by being deprived of the services of her child during the period of its minority, should have been given. (Sedg. Dam., 552, and notes; 5 Am. Law R., 397.)

III. The instruction, that if Reifle "was authorized by defendants to buy wheat, and to have the same delivered at the mill, and that in consequence of such authority, &c., * * he bought this wheat, and, in order to deliver it, caused this wagon to be driven on the sidewalk," &c., was wrong. He was employed in the office, and was going outside of his business in ordering this team to drive on the walk. There was no evidence to support this instruction. (Church vs. Mans-

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field, 20 Conn., 284; McKenzie vs. McLeod, 10 Bing., 385; Campbell vs. Staiert, 2 Murphy, 389; Satterlee vs. Groat, 1 Wend., 272; Shearm. & Red. Neg., 52, 70, 71; Storey vs. Ashton, 4 Q. B. [L. R.], 476.)

IV. The verdict and judgment against the city, rendered by agreement, released these defendants. It is well settled, that where several tort-feasors are sued for wrong for which they are jointly liable, and an accord and satisfaction is had with one of them, this releases all the others. (2 Greenl. Ev. § 30, and notes; 3 Taunt., 117; 2 Hen. & M., 38; 3 Coldw., 192, and cases cited; 2 Hammond (Ohio), 295; 3 Allen [Mass.], 474; 37 Barb., 317; 3 W. Va., (*contra*). A judgment may be a good satisfaction if taken as such, as well as a note (2 Hammond, *supra*); or "an agreement to refer to arbitration." (10 Ex., 569; 2 Johnson's cases, 195.)

Dillon & Taaffe, for Respondents.

I. Respondent, Ellen Owen, was a competent witness. (Tingley vs. Cowgill, 48 Mo., 291.)

II. The practice of driving horses and teams on this sidewalk had been constantly practiced for years, while appellants were the owners of the mill, and they assented to it, and sometimes directed it.

III. The instruction asked by defendants, expressly excluding the funeral expenses of the child, was properly refused. (Wagn. Stat., 520, § 4.)

IV. Defendants themselves admitted Reifle had authority to purchase wheat offered at the mill, in the absence of the owners. This necessarily included authority to tell the seller what to do with it after he had bought it.

V. The city not being a joint wrong-doer with defendants, even an accord and satisfaction with it would not be an accord and satisfaction with a stranger and would be no defense. (Grymes vs. Blofield, 1 Croke, 541; Clow vs. Borst, 6 Johns., 37; Bleakley vs. White, 4 Paige Ch., 654; Daniels vs. Hal-lenbeck, 19 Wend., 408; Stark's Adm'r vs. Thompson's Ex., 3 Monroe, 296.)

VI. The question, whether or not plaintiff, in the suit against the city, agreed to accept a verdict and judgment in satisfaction of her claim for damages, was submitted to the jury.

SHERWOOD, Judge, delivered the opinion of the court.

Action in the St. Louis Circuit Court by William Owen and Ellen Owen, his wife, against the defendants, Brockschmidt and others, for damages for the killing of the infant son of Mrs. Owen, formerly Mrs. Halpin, in whose name the suit was brought, but afterwards, upon her intermarriage with her present husband, he was added also as party plaintiff.

The petition in substance alleged, that the killing of the child occurred through the wrongful act, neglect and default of the defendants in causing and permitting a team of horses to be driven upon the sidewalk in front of their mill for the purpose of unloading a quantity of grain, and that the child was killed by being kicked by one of those horses, while thus on the sidewalk, and damages in the sum of \$5000 were asked.

The answer of defendants contained a general denial, and, in addition thereto, the defense was set up, that a suit for the same cause of action had been brought against the city of St. Louis; that, while said suit was pending, it was arranged and agreed between the parties thereto, that the plaintiff would accept a verdict and judgment for the sum of \$200, in lieu and satisfaction of said claim; that thereupon a verdict and judgment were entered for that sum; that that judgment is yet in full force, &c., and the said city of St. Louis is ready to pay and satisfy the same, &c., &c.

A reply to this answer was duly filed; a jury impaneled; evidence introduced tending to establish the allegations of the petition, and also evidence in support of the answer of the defendants, and at the conclusion of the testimony a verdict was returned in favor of the plaintiffs for the sum of \$1,000.

A motion for a new trial was filed and overruled. The cause appealed to general term, where the judgment of the special term being affirmed, an appeal was taken to this court.

The errors, urged by defendants for a reversal of the judgment rendered against them, will now be examined.

There was no error in permitting Mrs. Owen to testify in the cause, although her husband was also a party thereto, as the husband was but a nominal, and the wife the real, party in interest. (*Tingley vs. Cowgill*, 48 Mo., 291; *Fugate vs. Pierce*, 49 Mo., 441, and cases cited; 1 Wagn. Stat., 519-20, § 2.)

The court properly refused to permit § 7, article 4, of City Ordinance No. 5399, to be read in evidence by defendants, even if the terms "merchants or manufacturers" could be so construed as to embrace millers, as that section, while permitting the limited and partial occupation of sidewalks when goods were being received or shipped, manifestly allows such permission to extend alone to "said goods," and cannot by any legitimate rule of construction be made to grant leave to the teams and wagons, used in transporting those goods, to occupy the sidewalk.

The permission here referred to has its existence by virtue only of the ordinance, and obviously cannot exist or be extended beyond the express terms and provisions which give it origin.

The following instruction as to the measure of damages was asked by the defendants:

"The jury are instructed, that this suit is brought by the plaintiffs for their own benefit, to recover damages alleged to have occurred to Mrs. Owen in consequence of her child's death, and not for the injury done to the child itself, and that the jury, if they find for the plaintiffs, will award such sum as they think fair and just in view of the injury necessarily resulting to plaintiffs in consequence of the child's death; and that, in estimating these damages, they cannot allow anything to the plaintiffs on account of pain or suffering inflicted on said child, nor for the mental anguish or wounded feelings of the plaintiff, Mrs. Owen, nor anything on account of funeral expenses of the child; but that the jury are limited to the actual pecuniary loss of the mother by being deprived

of the services of the child during the period of its minority, estimated in money—is the amount to be recovered, and cannot exceed \$5,000,”—and was refused by the court, and we perceive no error in such refusal.”

The court had given, on the part of the plaintiffs, an instruction as to the measure of damages, which was but an embodiment of § 4 of the Damage Act. That section, *inter alia*, provides:

“In every such action, the jury may give such damages as they may deem fair and just, not exceeding five thousand dollars, with reference to the necessary injury resulting from such death to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default.”

The amount of damages, which should be awarded, will, from the very nature of the case, be in a great degree conjectural; the verdicts of different juries will differ widely upon the same state of facts, and it would be extremely difficult, if not utterly impossible, in the great majority of instances to lay down the rule in a more specific manner than has already been done by the statute itself. Besides, the instruction asked by the defendants ignored and made no mention of the circumstances, whether aggravating or mitigating, under which the killing took place, but left it to the jury as a simple question of dollars and cents to say by what amount the mother had suffered actual pecuniary loss in the death of her child. Such a construction as this would make the words, “having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default,” above mentioned, wholly meaningless and inoperative. Under the statute the jury are not restricted to such damages as are the necessary and inevitable result of the injuries sustained, but are free also to consider, in making up their verdict, the circumstances attendant on the “wrongful act, neglect or default,” which gave rise to the injury complained of. Again this instruction was erroneous in asserting that nothing was to be allowed for “funeral expenses;” such expenses must, if any thing can, be

one of the most obvious and necessary injuries resulting from death.

The giving of the following instruction on the part of plaintiffs is also assigned as error:

"If the jury believe from the evidence, that one Frederick Reifle was the employee and agent of the defendants on the 15th day of September, 1868, and that as such he was authorized by them to purchase wheat and have the same delivered at the said O'Fallon Mills, and that, in pursuance of that authority, he did, on the 15th of September, 1868, purchase a load of wheat for defendants, and that, in order to have said load of wheat delivered at the mills aforesaid for defendants, he drove or brought, or caused to be driven or brought, to the sidewalk, west of said O'Fallon Mills, the wagon or other vehicle and two horses spoken of by the witnesses in this case, then the jury will find that the act of said Reifle, acting as aforesaid, was the act of defendants."

This instruction is not entirely unobjectionable, but it is certainly not obnoxious to the objections urged against it by defendants; as the authority to purchase wheat necessarily implied and included authority to give directions as to its delivery.

In addition to that, as the evidence strongly tended to show that farmers' wagons had been frequently driven on the sidewalk with the knowledge of the defendants, it was immaterial as to whether in this particular instance the person mentioned in the above instruction had authority to order the delivery of the wheat on the sidewalk; and so the instruction, even if as faulty as is claimed by the defendants, could not possibly have worked them any injury.

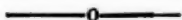
The evidence, offered by the defendants to show, that the claim of Mrs. Halpin against the City of St. Louis (which was admitted to be a claim for the same injuries as that prosecuted against the defendants) had been compromised by accepting a verdict and judgment for \$200, did not conclusively establish the fact of such compromise, and for that reason it was properly left to the jury under an appropriate

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instruction to say, whether such compromise had been actually effected, and the verdict and judgment for the sums mentioned rendered in Mrs. Halpin's favor accepted in satisfaction for the injury done. But the triers of fact have evidently found, that the arrangement effected with the city was not, and was not intended to be, a satisfaction of plaintiffs' claim, so that it becomes unnecessary to discuss the question, as to when a contract or agreement with one tort-feasor will bar an action against his fellow.

In conclusion there was evidence tending to support the issues on the part of plaintiff; the case as a whole was fairly presented to the jury by instructions which were in the main correct, and the judgment will therefore be affirmed.

Judges Wagner and Vories concur. Judge Adams absent. Judge Napton did not sit.



WILLIAM POLSTON, Respondent, vs. MICHAEL SEE, Appellant.

1. *Practice, civil—Slander—Trials—General verdict—Several counts.*—In an action for slander, the petition containing several counts, a general verdict is proper, when the several counts contain the same slander uttered at different times.
2. *Practice, civil—Trials—Evidence—Slander—Condition in life.*—The condition in life of the parties to a slander suit, is a proper subject of inquiry on the question of damages.
3. *Practice, civil—Trials—Slander—Evidence—Statements—Res gestæ.*—In an action of slander for charging plaintiff with stealing defendant's lumber, the declarations and acts of the plaintiff at the time of his taking the lumber are admissible in evidence, though the defendant was not present, as a part of the *res gestæ*.
4. *Practice, civil—Trials—Verdict—Slander—Crime—Plea of justification—What evidence required.*—In a slander suit for charging the plaintiff with the commission of a crime, wherein the defendant justifies the charge, the verdict must be for the plaintiff, if the jury have a reasonable doubt of the plaintiff's guilt.

Per SHERWOOD, Judge, dissenting.

1. *Practice, civil—Trials—Slander—Justification—Verdict—Preponderance of evidence.*—In an action of slander, when the answer justifies the language, the verdict should be in accordance with the preponderance of the testimony, as in other civil causes.

2. *Practice, civil—Trials—Instructions—Slander.*— In an action of slander for charging the plaintiff with theft, an instruction to the jury to find for the defendant, if they find that the plaintiff, in person, or by agent, took away the property, is wrong, because it omits the essential ingredient of felonious intent.
3. *Practice, civil—Trials—Instructions—Confusing—Re-trial.*— When the instructions given on a trial must have confused and misled the jury, a new trial should be granted.

Appeal from Audrain Circuit Court.

Sanders & Carkener, for Appellant

I. The plaintiff was permitted to detail conversations between himself and one, Johnson, who was in no way a party to the record. The defendant not being present at such conversations, they were hearsay evidence, and inadmissible.

II. The instruction, requiring proof of plaintiff's guilt beyond a reasonable doubt, was erroneous. (*Kincade vs. Bradshaw*, 3 Hawks, 63; 9 N. H., 150; 25 N. H., 114; *Ellis vs. Buzzell*, Am. Law R. [July 1873], and notes.) In this State an express ruling on this point in a slander suit has never been made; but this point is fully settled in *Marshall vs. Thames Ins. Co.*, 43 Mo., 586. Slander being here essentially a civil action, and the plaintiff therefore being allowed to testify and to rebut the plea of justification (a thing not true where the other rule obtains), there can be no good reason given why a greater degree of evidence should be required than in any other civil suit.

III. Though evidence of defendant's wealth is admissible, as a means of estimating punitive damages, evidence of plaintiff's poverty is not admissible, since it can throw no light on that matter.

Powell & Hughes, for Respondent.

I. When a special plea of justification is set up by the defendant in an action of slander, the same evidence must be adduced as would be necessary to convict the plaintiff upon an indictment for the crime imputed to him. (2 Greenl. Evid., § 426, and cases cited.)

II. The pecuniary conditions of plaintiff and defendant are

proper matters to be considered by the jury in estimating the damages in a case of slander. (Buckley vs. Knapp, 48 Mo., 152, and cases cited.)

Forrist & Ladd, with whom was T. J. Powell, for Respondent.

I. In an action of slander, proof may be given of the condition in life of the respective parties to the action, as affecting the question of damages. (Buckley vs. Knapp, 48 Mo., 152; Larned vs. Buffinton, 3 Mass., 546; Townsh. Libel and Sl., § 390; Tillotson vs. Cheetham, 3 Johns., 56; Bodwell vs. Swan, 3 Pick., 376; Smith vs. Lovelace, 1 Duval [Ky.], 215; Justice vs. Kirlin, 17 Ind., 588.)

II. The time, place and circumstances of taking property, alleged to be stolen, may be shown by either party as bearing upon the question of intention. The animus of the taking, whether felonious or otherwise; and words spoken while the property is being taken, are but verbal acts—part of the *res gestæ*, and are also competent. (1 Greenl. Evid., § 108, *et seq.*; Beardslee vs. Richardson, 11 Wend., 25; Lund vs. Tyngsborough, 9 Cush., 36; 3 Greenl. Evid., § 157.)

III. To sustain a plea of justification, alleging the plaintiff guilty of larceny, the same strictness of proof is required, as would be required to convict him of larceny, if indicted therefor. (Bradley vs. Kennedy, 2 G. Green, [Ia.] 231; Wonderly vs. Nokes, 8 Blackf., § 589; Woodbeck vs. Keller, 6 Cow., 118; Darling vs. Banks, 14 Ill., 46; Sperry vs. Wilcox, 1 Met., 267; Comm. vs. Snelling, 15 Pick., 321; Forshee vs. Abrams, 2 Ia., 571; Wilmett vs. Harmer, 8 Car. & P., 695.)

IV. The *gravamen* of the action was that defendant had accused plaintiff of the crime of larceny, as connected with a single transaction, although the words are said in somewhat different collocations; practically then, there is but one count in the petition. If so, then the general verdict was right, and the judgment rendered legal. (Bradley vs. Kennedy, 2 G. Green, [Ia.] 231; Clemens vs. Rollins, 14 Mo., 604; Brownell vs. Pac. R. R. Co., 47 Mo., 239; Brady vs. Connelly, 52 Mo., 19.)

ADAMS, Judge, delivered the opinion of the court.

This was an action for slanderous words, charged to have been spoken by the defendant of the plaintiff, and thereby imputing to him the crime of larceny in stealing lumber belonging to the defendant.

The slanderous words were set out in three several counts of the petition, which concluded with a prayer for damages to the amount of \$5,000.

The answer denied the speaking of the words as charged in the first and second counts, and justified as to the last count, on the ground that the words were true, and that the plaintiff had been guilty of the larceny as charged.

There were several mis-trials, but the case finally resulted in a verdict and judgment for the plaintiff for \$500. The verdict was a general one, finding all the issues in favor of the plaintiff, and assessing a single sum of five hundred dollars for his damages.

Each party gave evidence tending to prove the issues on their respective sides. The plaintiff was allowed to prove his own condition in life and also that of the defendant, as bearing upon the question of damages, and an instruction was also given on this point in favor of the plaintiff. During the progress of the trial the plaintiff was introduced as a witness, and was allowed to testify in regard to what had been done and said by him in removing some lumber from the defendant's mill when the defendant was not present.

After the close of the evidence, various instructions were asked and given for the plaintiff, only one of which need be referred to, as there is no point made on the others. The instruction complained of was to the effect, that under the defendant's plea of justification, the same amount of proof was necessary to convict the plaintiff as if he was on trial for the crime, and that if the jury entertained a reasonable doubt of his guilt they must find for the plaintiff; that any such doubt, however, to be available, must be a rational doubt, growing out of the evidence in the case and consistent with it, and not a mere hypothesis or possibility of innocence.

1. The objection, that there was not a finding and assessment of damages on each count of this petition, is not tenable. The words charged in each count had reference to the same crime, and might have been set forth in a single count. It was the same slander, uttered at different times, and it was proper to assess one amount of damages for the entire slander, though imputed at several times.

2. The plaintiff's condition in life, as well as that of the defendant, are proper subjects of inquiry in slander cases on the question of damages. Slander, uttered by a man of great influence in society, would certainly be more injurious than if spoken by a party of no consequence at all.

3. The testimony, which the plaintiff was allowed to give in regard to what was done and said when he took the lumber, was a part of the *res gestæ*, and was properly admitted. The words spoken by him in the absence of the defendant were verbal acts, and as such admissible as a part of the transaction.

4. The main point discussed here grows out of the instruction by which the jury were told, that if they had a reasonable doubt of the plaintiff's guilt under the plea of justification, they must find the issues for him.

I am not aware, that this question has ever been directly passed on by this court. So far as I know, the legal profession throughout the State have acted on the presumption that it was the settled law. It seems to have been so considered at the Circuits, and it is now for the first time mooted in this court.

It has the support of the English authorities, and, I presume, of the majority of the American courts. The reason of the rule is, that a verdict of a jury on the question of guilt or innocence has at least the same moral force as a verdict in a criminal trial for the same offense. There seems to be no other civil case where a verdict has the same moral force. If this had been a suit for trespass against the plaintiff for the taking and conversion of the defendant's lumber, the simple fact of trespass, without regard to the intention, would have

been sufficient to warrant a verdict. The *animus furandi* might have been totally wanting, and yet the plaintiff be guilty in the law of trespass. Here, as in a trial for the crime of larceny, the *animus* is the main point before the jury, and the force of the verdict of guilty is looked upon as the same. A party found guilty on a plea of justification, though not liable to the consequences or punishment attached to the same result in a criminal case, is covered by the same moral turpitude, and in the eyes of the community is pointed at by the finger of scorn as equally odious. In actions on policies of insurance, where the defense is that the defendant burnt his own house, it has been held that a mere preponderance of evidence is sufficient to establish the defense. The distinction is, that this is a good defense under the policy, no matter what the intent of the defendant was in burning his house. By doing so, he violated the express terms of the policy, and could not take advantage of his own wrong. Our statute makes it arson for a party to burn his own property in order to recover insurance on the building. The question, whether he burnt it for one purpose or another, is wholly immaterial in an action on the policy. If he voluntarily burnt it at all, he will not be allowed to recover, as, by doing so, he violated the policy itself. The plea of justification in slander is unlike any other civil case, and for this reason it has been treated as an exception to the general rule in regard to the preponderance of the testimony and the amount necessary to a conviction. This court has no power to make or repeal laws, we must decide the law as we find it to exist. If a change in this rule be desired, the legislature must be looked to, and not the courts, to make it.

Let the judgment be affirmed. The other judges concur, except judge Sherwood, who dissents.

Dissenting opinion of Judge SHERWOOD.

Polston brought his suit in the Audrain Circuit Court against See, for certain slanderous words, alleged to have been spoken and published by the defendant, charging the plaintiff with the crime of theft.

The answer of the defendant denied the speaking of the words set forth in the first and second counts of the petition, but admitted uttering the words specified in the third count, and said that they were true, and that plaintiff did steal, take and carry away a large quantity of defendant's plank and lumber.

The cause was tried before a jury, and the evidence was conflicting. At the conclusion of the testimony the court gave nine instructions for the plaintiff, and six for the defendant. Among those on behalf of the plaintiff, was one couched in these words :

"The jury are instructed that to support the special plea of justification set up by the defendant in this case, to-wit : that the plaintiff did steal, take and carry away defendant's lumber, the same evidence must be adduced as would be necessary to convict the plaintiff upon an indictment for the crime imputed to him ; and if the jury entertain a reasonable doubt of the plaintiff's guilt of the crime charged against him by the defendant, the jury should find a verdict for the plaintiff, and assess his damages at such sum as they may deem him entitled to under all the circumstances, not to exceed the sum of five thousand dollars. Any such doubt however, to be available to plaintiff, must be a rational doubt, growing out of the evidence in the case, and consistent with it, and not a mere hypothesis or possibility of innocence."

This instruction was objected to by defendant, and the propriety of giving it will therefore now be discussed.

Mr. Greenleaf, in his work on Evidence, lays down the rule in this way :

"To support a special plea of *justification*, where *crime* is imputed, the same evidence must be adduced as would be necessary to convict the plaintiff upon an indictment for the crime imputed to him ; and it is conceived, that he would be entitled to the benefit of any reasonable doubts of his guilt in the minds of the jury, in the same manner as in a criminal trial." (2 Greenlf. Evid., § 426.)

But of the authorities cited in the margin in support of

the text, some of them either contravene the doctrine altogether, or yield it but a doubtful and indifferent support. And the English cases, which uphold it, do so on grounds which are purely *local*, and applicable in that country alone where the adjudications were made.

The *reason*, which gave origin to the rule in England was this :

If upon the trial of the plea of justification (which imputed the commission of a felony) the issue was found for the defendant, the plaintiff was thereupon held to answer the felony without any further accusation ; the *verdict* being held equivalent to an *indictment*, and the intervention of a grand jury unnecessary. (Cook vs. Field, 3 Esp., 133 ; 2 Curw., Hawk., 291 ; 2 Hale 150 ; 1 Chit. C. L., 135 and 164.) So that *penal* consequences to the plaintiff ensued upon a finding under such circumstances for the defendant, and the rigidity of the rule we are considering was but a part and parcel of that tenderness and benignity, which the law has ever extended towards him whose life or liberty is imperiled.

And to such an extent in England was the doctrine carried, where the verdict in a civil case disclosed the commission of a felony, that it was not confined to actions for libel and slander alone, but parties were frequently sent over to the criminal side of the assizes to take their trial for felonies as the result of verdicts in other civil actions. (Prosser vs. Rowe, 2 C. & P., 421, and note 6.) But as in this country no such results attend the verdict of a jury in any civil case, it would seem evident that the rule, as well as the reason on which it is founded, should cease together in accordance with the maxim "*Cessante ratione legis cessat ipsa lex.*"

And in those States of our Union, where the English rule has been followed, it is thought to have resulted from the inadvertent adoption of proceedings, which have no applicability to our, in many respects, widely different system of jurisprudence.

In Iowa the rule obtains, and the later decisions in that

State are placed upon the ground, that the question is no longer *res integra*, that it has prevailed for many years, and the Legislature has not seen fit to interfere. But there, as above seen, the point has been the subject of repeated adjudications by the Supreme Court of that State. So also in Indiana the rule prevails in all its broadness; and no doubt for like reasons as cited above. (Tull vs David, 27 Ind., 377.) However in the earliest decisions in that State, where the question arose, nothing is said touching the doctrine of reasonable doubt as applicable to such cases, but only that "to support his plea he (the defendant) was bound to show, that the plaintiff had sworn falsely on the trial to a matter material to the issue." (McGlemery vs. Keller, 3 Blackf., 488.) And in *Offatt vs. Earlywine*, 4 Blackf., 460, the court, while holding the *same kind* of evidence was necessary on the part of the defendant who justifies, declined to say, whether the *same strength* of testimony was requisite or indispensable to the maintenance of the defendant's plea.

In the subsequent cases in that State, the broad doctrine, as enunciated in *Tull vs. David*, *supra*, has been sanctioned. And this is true of many other States. But it is conceived that, wherever this doctrine has received the sanction of the courts of this country, two elements will be found in the error which conduced to such result:

First, that, already alluded to, of blindly following English precedents, oblivious of the reasons which gave them origin: Second, that of confounding together, and regarding as *identical*, the *same kind* with the *same degree* of proof.

Where the alleged slanderous charge imputes the crime of perjury, there the oath said to be falsely taken must be rebutted, or neutralized, by the testimony of one witness. The case then stands oath against oath; then the *equipoise*, thus created in the evidence, is, in order to sustain the plea of justification, to be overcome by the testimony of one witness, or by corroborative circumstances. And this is all that many of the authorities intend, when employing language of a much stronger and more comprehensive signification.

The same view, as here expressed on this subject, is evidently taken also in *Hopkins vs. Smith*, 3 Barb. [S. C.], 599, in commenting upon what is meant in *Woodbeck vs. Keller*, 6 Cow., 118, where it is said, "that where the defendant justifies a charge of perjury, the evidence must be the same as required to convict a defendant on an indictment for perjury;" and, in construing the language employed by the court in *Clark vs. Dibble*, (16 Wend., 601), "that the evidence must be sufficient to convict" &c., for the court in *Hopkins vs. Smith*, *supra*, after making the quotations just cited, say: "In other words the defendant must prove all the particulars which constitute the offense of perjury."

During the prevalence of the former practice in chancery the answer of the defendant, being under oath, had to be disproved by two witnesses, or by one witness and corroborating circumstances, and yet no one ever had the temerity to contend, that the mind of the chancellor, before entering a decree, had to be satisfied of the truth of the allegations of the bill beyond a reasonable doubt.

Under the operation of the English rule in those States, where it has been adopted, A. may sue B. for the crime of burning his house, and may recover upon testimony which is sufficient in other civil cases. But if A. is so unguarded as to state, that B. did such criminal act, and B. sues him, he will be mulcted in damages, if not able to establish beyond "a reasonable doubt," that B. had committed the crime of *arson*.

Surely such *chameleon-like* changes in the rules of evidence, where the same facts are involved, do not comport with the dignity of the law as a science, nor with the proper administration of justice. Our natural sense of right revolts at such *purely artificial* and *palpably unjust* distinctions.

The point now being considered is of *first impression* in this State, and it is therefore important that it be settled on a correct basis, and in strict accordance with the analogies of the law and practice in *other* civil actions.

A question, nearly akin however to the one under discussion, was passed upon by this court in *Marshall vs. Thames*.

Fire Ins. Co., 43 Mo., 586, an action on a policy of insurance, and the defense was, that the plaintiff had *burned* the property insured; after stating what the rule is in *criminal* cases, it is said: "In all civil cases it is the duty of the jury to decide in favor of the party on whose side the weight of evidence preponderates and according to the reasonable probability of the truth." And manifestly there can be no reason founded in *principle*, why a greater amount or degree of evidence should be required in an action of *slander*, where *arson* is the charge, and the truth of that charge constitutes the justification, than in an action on a *policy* of *insurance*, where the truth of a *like* charge is plead as a defense to a suit on the policy.

Although the views here enunciated are in opposition to the rule as laid down by respectable and able authorities in many, if not in a majority, of our sister States, yet these views are, as I think has been plainly shown, supported by sound reasoning, and are besides upheld by courts of unquestioned ability in the States of Maine, New Hampshire North Carolina, Louisiana and Alabama. (Ellis vs. Buzzell, Am. Law, Reg. [July 1873] 426; Matthews vs. Huntly, 9 N. H., 146; Folsom vs. Braun, 25 *Id.*, 114; Kincade vs. Bradshaw, 3 Hawks., 63; Hoffman vs. Western M. & F. Ins. Co., 1 La. An., 216; Hopper vs. Ashley, 15 Ala., 457; Spruil vs. Cooper, 16 *Id.*, 791.)

Viewing this matter as above indicated, the giving of the instruction complained of constitutes a good ground for reversal of the judgment recovered by the plaintiff. In addition to this, the court, on the part of the defendant, gave an instruction to the effect, that, if plaintiff, either in person or by his agent, *took and carried away* the lumber of defendant, knowing it to be defendant's, without the consent of defendant, the jury should find for the defendant.

This instruction utterly ignores and omits the essential ingredient of a *felonious intent*, without which there could be no larceny.

By no possible stretch of ingenuity can these instructions be made to harmonize. They are in direct and irreconcilable conflict, and neither one asserts the law. (43 Mo., 586.)

The jury is told to find a verdict for the plaintiff, unless the evidence establishes his guilt beyond a reasonable doubt, and for the defendant, if the plaintiff "took and carried away" his property. These instructions could have had no other effect than to confuse and mislead the jury; to make their verdict mere *guess work*.

The above are grounds very satisfactory to myself at least, why this cause should be re-tried; but my associates, with whom I do not concur as to the chief question involved in this case, while they do not controvert the correctness of my reasoning, state, in behalf of the conclusion which they have reached, that the plea of justification in actions of slander is an exception to the general rule; and I am told that: "The reason of the rule" (in such actions) "is, that a verdict of a jury on the question of guilt or innocence has at least the same moral force as a verdict in a criminal trial for the same offense," and that "there seems to be no other civil case where a verdict has the same moral force." But this is altogether an erroneous idea, as I will now proceed to show.

In an action for *Crim. Con.* the verdict, if for the plaintiff, would set the seal of an indelible stigma on the character of her, concerning whom the action was brought, as effectually as if the parties engaged in the criminal act were found guilty thereof upon an indictment charging such criminality, and consequently a verdict for the husband, in the civil suit I have instanced, would be as heavily freighted with "*moral force*," as would the verdict for the defendant, which upholds the plea of justification, in an action for slander.

So also, in an action on a policy of insurance, a verdict, which in effect brands the plaintiff therein with the crime of arson, would carry with it an amount of "*moral force*" not inferior in degree to that borne by a verdict, which establishes the truth of the alleged slanderous words, in a suit for defamation of character.

The above illustrations are only a few out of a great number, which might be employed to show the utter fallacy of the argument based on "*moral force*."

It is by no means of infrequent occurrence, that verdicts in numerous civil actions practically establish that a party to the action is guilty of some highly criminal offense, and yet this fact is not allowed to change or overturn the rules of evidence, nor to compel an increase in the amount of testimony offered to support any given issue.

Mr. Greenleaf, in his work on Evidence, lays down just the *same rule* in actions on policies of insurance, where the charge is that the plaintiff burnt his own property, as he does in actions of slander where the defendant justifies by pleading the truth of the alleged slanderous words. (2 Glf. Ev., § 408.)

And the learned author cites "*English Authorities*" in support of his text. But these authorities are not held for law in many of the American States, nor in this State as already shown in *Marshall vs. Thames Fire Ins. Co.*, *supra*, where this court repudiates the English doctrine, and asserts the sufficiency of a preponderance of evidence in such cases to establish the defense that *arson* had been committed on the property insured. For Judge Wagner, in commenting on the issues raised by the pleading, expressly says :

"The defendant in its answer * * * * * averred as matter of defense, that the burning of the Steamboat Magnolia * * * * * was occasioned, caused and brought about, by the direct agency, procurement, contrivance and directions of Marshal and Kilpatrick, the plaintiffs. *The whole defense was distinctly staked upon that issue.*"

But it is said that "in actions on policies of insurance, where the offense is, that the plaintiff burnt his own house, it has been held, that a mere preponderance of evidence is sufficient to establish the defense. The distinction is that this is a good defense under the policy, no matter what the intent of the plaintiff was in burning his house."

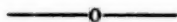
This attempted distinction is however by no means satisfactory; because it would be impossible to directly charge the plaintiff with burning his own property without imputing to him the commission of a felony, and without, if the verdict sustained the charge, effectually stamping the disgrace

of such felony upon him. Another basis suggested, rather than offered, to sustain the opinion of the court is that, so far as the court is informed, the legal profession throughout the State have acted upon the presumption that it (the rule referred to) was the settled law.

Heretofore, it had been supposed, that it belonged exclusively to *this tribunal* to determine what the law, settled or otherwise, was, and that, in so declaring the law, it would not be engaged in any extra judicial or legislative act.

Aside from decisions, which by being acted upon for a series of years have thereby become rules of property, when a point is presented for the *first time* to a court of last resort, it should be the highest aim of modern adjudication to follow *principle* always, in preference to, and rather than, *mere precedent*; to subject decisions of other courts, or the *dicta* of text writers, to the crucial test of a skeptical and remorseless analysis, and to unhesitatingly reject them, if found wanting in that life of the law, sound reason.

For, as Sir William Jones so eloquently observes: "If law be a science, and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of reason."



JACOB KLINGMAN, Respondent, *vs.* PARKER HOLMES, Appellant.

1. *Parent and child—Battery of child—Suit by parent—Loss of services—Exemplary damages.*—In a suit by a parent, for battery of his child, evidence having been offered of loss of the services of the child, it is competent for the jury to look at all the circumstances attending the battery, and to award such damages as they may deem ample and reasonable to compensate the plaintiff, and also to vindicate his rights, and to prevent similar abuses in future.

Appeal from Adair Circuit Court.

Barrow & Millan, and Ellison & Ellison, for Appellant.

I. This is a suit by the father for an assault on his son.

The foundation of the action is that the party assaulted was the servant of the plaintiff. Exemplary damages are not allowed in such a case. (Cowden vs. Wright, 24 Wend., 429; Whitney vs. Hitchcock, 4 Den., 461; Pack vs. Mayor of New York, 3 Coms., 489; Castanos vs. Ritter, 3 Duer, 370; Gilligan vs. N. Y. & H. R. R., 1 E. D. Smith, 453; Oakland R. R. Co. vs. Fielding, 48 Penn. St., 320; 38 Maine, 277; Richards vs. Farnham, 13 Pick., 451; Penn. R. R. Co. vs. Kelly, 31 Penn. St., 372; Same vs. Zebe, 33 Penn. St., 318; Sedg. Dam., side p. 554 [5 Ed.]; 9 Bacon Abd., 457.)

Harrington & Cover, for Respondent.

I. The jury could give exemplary damages. (James vs. Christy, 18 Mo., 162; Magee vs. Holland, 3 Dutch., 86.)

II. This court has laid down the rule, that in all actions of tort exemplary damages are allowed. (Buckley vs. Knapp, 48 Mo., 152; Freidenheit vs. Edmundson, 36 Mo., 226; Franz vs. Hilterbrand, 45 Mo., 121; Goetz vs. Ambs, 27 Mo., 28.)

WAGNER, Judge, delivered the opinion of the court.

The plaintiff brought his action against the defendant for an assault and battery committed upon his son.

The case was clearly proved, and the evidence shows that the defendant followed the son for a considerable distance and beat him cruelly and mercilessly.

The only question of any importance, presented for our consideration, is the action of the court in giving the fifth instruction for the plaintiff, which told the jury, that, if they found for the plaintiff, they should allow such damages as would compensate him for his loss of time and for any damage he might have suffered, permanent or otherwise, and for the time and trouble in taking care of his son, and in addition thereto they might allow such farther sum for exemplary damages or smart money, as they might believe that the circumstances and facts in evidence warranted.

It is now insisted in the argument, that in an action for

assault and battery on the child, the parent's ground of action being the loss of service, the measure of damages is the actual loss which the parent has sustained, but that exemplary or vindictive damages cannot be recovered. That these last are only given to the injured child if he brings his action in his own name. This position is not without authority to support it. The courts of New York hold, that in trespass for an assault and battery upon a child or servant of the plaintiff, the measure of damages is the actual loss which the plaintiff has sustained, and that exemplary damages cannot be given. (*Cowden vs. Wright*, 24 Wend., 429; *Whitney vs. Hitchcock*, 4 Denio, 461.)

Mr. Sedgwick quotes these cases, as establishing the rule contended for, but he is evidently dissatisfied with their reasoning. (Sedg. Dam., [3 Ed.] 586-7.)

They proceed upon the theory, that the loss of service is the gist or legal gravamen of the action, and that the necessary expenses, that flow from, and are incident to, it, can only be taken into the account in determining the amount of damages.

They draw a distinction between actions of this kind and those for seduction, where the person seduced is incompetent to sue. It is perfectly true, the action for seduction is founded on the relation of master and servant, and not upon that of parent and child, and has always been maintained, not upon the seduction itself, but upon the consequent loss of the daughter's service, in which the parent is supposed to have a legal interest. But it is well settled, that the loss of service is not the real measure of damages in such cases. It is simply a legal fiction resorted to, for the purpose of giving compensation for a great injury. And it must be farther borne in mind, that in actions of seduction the daughter is a partaker of the crime, and therefore cannot sue her seducer. But the cases, holding that the loss of service is necessarily the foundation of the action, are not decisive, and controlling the question in reference to assault and battery, for there are very respectable authorities deciding that the action will lie

on the part of the parent, where the child was incapable of rendering any service.

In *Dennis vs. Clark*, 2 Cush., 347, it is expressly decided, that, where an infant child, too young to be capable of rendering any service to his father, is injured by a third person under such circumstances as would give the infant himself an action against such third person, and the father is put to care and expense in consequence thereof, he may maintain an action for an indemnity.

So in *Durden vs. Barnett*, 7 Ala., 169, it was held, that the action would lie, and the court said, "even if the child was of very tender years, so as to be incapable of rendering any useful services, the action would doubtless lie, if averments were made of consequential injury by expenses caused in healing the wounds." According to these authorities services are not the indispensable and necessary causes of the action, but other injuries may be sufficient. The question, however, as to whether exemplary damages might be given, was not raised. In a well considered and ably reasoned case in New Jersey (*Magee vs. Holland*, 3 Dutch., 86), whilst the court held, that a parent must show some loss of services to enable him to maintain action on the case for taking his infant children out of his possession, yet, when loss of services was shown as a foundation for the action, the jury might look at all the circumstances of the case, and give exemplary damages to compensate him for the injury done to his feelings and to prevent similar abuses. The court cites the case of *Whitney vs. Hitchcock*, *supra*, in respect to actual damages, but does not undertake to distinguish it from the one under consideration. In principle they are doubtless both the same.

Upon the main question we are now determining, the court says: "There having been a good foundation shown for the action, upon the strictest principles of law was the rule of damages laid down at the trial erroneous? Besides the loss of service, and the actual and necessary expense of the pursuit, the jury were instructed, that they had a right to compensate the plaintiff, so far as damages could compensate, for

the injury done to his feelings, and that they might look at all the circumstances attending the taking of the children out of the possession of the father and out of the State, and give such damages as they should deem reasonable, to vindicate the rights of the plaintiff and to prevent similar abuses."

This was in accordance with the law, as stated by Ch. Justice Abbott, in *Hall vs. Hollander*, who said, that when the foundation of service existed, courts of justice have allowed all the circumstances of the case to be taken into consideration with a view to the calculation of the damages. It was also in accordance with the opinion of the Supreme Court of the United States in the case of *Day vs. Woodworth*, 13 How., 363, that "it is a well established principle of the common law, that, in actions of trespass and all actions on the case for *torts*, a jury may inflict what is called exemplary, punitive or vindictive damages, upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff." The right of the jury to consider all the circumstances of the case, and to award exemplary damages, necessarily drew with it the right to consider the injury done to the feelings of the father as well as all the other circumstances of aggravation.

I am not willing to concede, that in an action of this kind the jury might not properly look at all the circumstances and apportion their damages to the actual wrong done to the plaintiff's feelings and paternal affection and rights, without any positive proof of malice or oppression.

Greenleaf, whose strenuous advocacy of the principle of compensatory damages only, and whose opposition to exemplary damages is well known, lays down the doctrine, that the attendant circumstances and natural results, including the facts which occur and grow out of the injury up to the day of the verdict, affect the damages and are admissible in evidence; and where an evil intent has manifested itself in acts and circumstances accompanying the principal transaction, they constitute parts of the injury. (2 Greenl. Ev., §§ 268, 271.)

Although, as we have seen, there are cases entitled to the highest respect, which hold that a loss of service is not necessary to the maintenance of the action, still in the present case the loss was directly proved.

I think it was then competent for the jury to look to all the circumstances attending the battery, and to award such damages as they might deem ample and reasonable to compensate the plaintiff and also to vindicate his rights, and prevent similar abuses in future.

This, in my judgment, is the safest and best rule, and will be found to have a salutary effect on those who are disposed to resort to violence to gratify or avenge their personal animosities.

I think therefore that the judgment should be affirmed. The other judges concur.

—O—

IN THE MATTER OF ESTATE OF JOHN WALSH, deceased, *vs.*
WILLIAM MORRISSEY, ADMINISTRATOR, Appellant.

1. Judgment affirmed.

Appeal from St. Louis Circuit Court.

M. Kinealy, for Appellant.

Bakewell & Farish, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This case originated in the Probate Court in and for St. Louis county, the controversy growing out of exceptions made to items in the administrator's account of credits claimed by him in making his final settlement of the estate of his intestate.

It appears from the record, that John Walsh, the deceased, died between four and five o'clock of the afternoon, of the 10th day of August, 1866; that he had a wife and one son, who survived him; that the son died between nine and ten o'clock of the same evening, and that the widow, Johanna Walsh, died on the same evening between ten and eleven o'clock.

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After the death of the whole family, administration was granted to William Morrissey on the estate of John Walsh, and the public administrator took charge of the estate of Johanna, the widow of John Walsh.

It further appears, that Morrissey, as the administrator of the estate of John Walsh, made two annual settlements of said estate in the Probate Court, one at the September term, 1867, of said court, and the other on the 21st day of December, 1868.

At the time of the death of said John Walsh, his father, Michael Walsh, who was an old man over seventy years of age and without means, resided with his said son; that the old man, shortly after the death of his son and his family, desired to return to Canada, where he had formerly resided, and, not having the necessary means on which to travel, applied to Morrissey, the administrator of his son, for assistance; that Morrissey, mistakenly believing, that as the whole family of John were dead, that his father would be and was his sole heir and distributee, concluded to and did advance the old man the sum of two hundred dollars. The old man immediately went to Canada, where he has ever since remained. After this transaction, when Morrissey made his first annual settlement, he presented the receipt of the old man Walsh for the two hundred dollars advanced to him, and claimed a credit for said amount as for so much paid out in the course of his administration of the estate of John Walsh. He was then informed, that, as the child of John Walsh and his wife were both living at the time of his death, the father was not a distributee of the estate, and this account for two hundred dollars was rejected by the Probate Court, and the settlement made without any reference thereto. Shortly after this settlement Morrissey, the administrator of John Walsh, procured his attorney, who was advising and assisting him in reference to his duties as administrator, to make out an account in favor of Michael Walsh (the father of John) for the sum of two hundred dollars for money loaned to his son in his lifetime; the attorney made out the account, and prepared a proper affida-

vit to be made by the father, in order to present the account to the Probate Court for allowance, and also prepared a power of attorney, purporting to authorize one Butler to present the claim for allowance to the Probate Court in the name of and for Michael Walsh, and sent these papers to Canada to the old man Walsh to be by him executed and returned. These papers were afterwards executed by Michael Walsh in Canada, and returned to the attorney who prepared and sent them, who together with Morrissey appeared in the Probate Court on the 4th day of December 1867, and presented this account for two hundred dollars for allowance as a demand against the estate of John Walsh, deceased. The administrator waived notice, and some evidence was introduced, and the claim allowed by the court. In a few days after the allowance of this demand, and during the same term of the Court, persons interested in the estate appeared in the Probate Court, and made a motion to set aside said allowance, because it was claimed, that the account allowed was fictitious and fraudulent, that no such indebtedness existed, and that it had been allowed, and presented, by the collusion of the claimant and the administrator. Notice of this motion was given to the administrator, and to the attorney who had procured the allowance of the account, he being also the attorney of the administrator in the management of the estate. The administrator and attorney both appeared at the hearing of the motion, but the attorney claimed that he was no longer the attorney of Michael Walsh, that he had ceased to be his attorney since the claim was allowed, but he appeared and resisted the motion. The court proceeded to hear the motion, and, after hearing the evidence, set the order allowing the claim for the two hundred dollars aside and rejected the same. On the 22st day of December, 1868, Morrissey, the administrator of John Walsh's estate, made his second annual settlement; at this settlement he produced amongst other things the account for two hundred dollars, which had been allowed in favor of Michael Walsh and the allowance thereof afterwards set aside by the court as was herein before stated, and

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claimed a credit in his favor in said settlement to that amount. The account had the receipt of Butler, the attorney in fact of Michael Walsh, indorsed thereon, bearing date on the same day that the account had been allowed by the Probate Court; the account was rejected by the Probate Court, and the annual settlement made without making any allowance to the administrator therefor. The court found on said second settlement, that there was a balance against the administrator in favor of the estate of three hundred and ninety two dollars and twelve cents, and there follows the following entry made by the Probate Court: "Hereupon also comes Catherine Sheeby, the mother of deceased widow of John Walsh, deceased, James Ralahan, brother of said widow, and Eliza Kiley and Catherine Haley, sisters of said widow, and it being shown to the satisfaction of the court, that said Catherine Sheeby, James Ralahan, Eliza Kiley and Catherine Haley are the lawful and only heirs at law of said John Walsh, deceased, whereupon, on motion of said heirs, it is ordered by the court, that the said William Morrissey, administrator as aforesaid, do pay to said Catherine Sheeby, James Ralahan, Eliza Kiley, and Catherine Haley, each, the sum of ninety dollars on account of their several distributive shares in the estate of John Walsh, deceased."

From this order of distribution made by the Probate Court, Morrissey, the administrator, appealed to the Circuit Court, where the order was set aside and the case remanded to the Probate Court.

On the 17th day of December 1869, the said Morrissey, administrator of John Walsh, deceased, having given due notice for said purpose, appeared in the Probate Court, and exhibited his account for a final settlement of said estate. The distributees of said estate also appeared, and objected to various items of the account exhibited by said administrator, and also filed their objections to various items before allowed to him in his previous annual settlement of said estate, and the court having fully heard and considered the same, found the balance in favor of the estate and against the administrator, to be one

hundred and sixty eight dollars and seven cents, and ordered the administrator to distribute the same by paying the same to Henry Gambs, public administrator, having in charge the estate of the widow of John Walsh, deceased. From this order the said Morrissey appealed to the St. Louis Circuit Court.

In the Circuit Court at special term the distributees again appeared, and renewed their objections or exceptions to the various items of the account, which had been presented by the administrator for final settlement.

Among the items of the account objected to was the account or allowance for two hundred dollars in favor of Michael Walsh, which allowance was afterwards set aside by the court as before stated.

The distributees of the estate also objected to the following items in the account filed for a final settlement, and which had been allowed to the administrator by the Probate Court in his annual settlements, to-wit:

- 1st. An account for funeral expenses of Mrs. Walsh and child, who both died after the death of John Walsh, \$105 00.
- 2nd. They objected to one-half of an account for fifty dollars for church services at the funeral of Walsh and his wife, 25 00.
- 3rd. The funeral services and expenses of the child of Walsh that died after the death of its father, 63 45.
- 4th. To an amount over-charged by administrator for his services, 9 70.
- 5th. To a credit of forty dollars, with which the administrator was charged, for the property of widow. 40 00.

The main contest in the case seems to have been over the account for two hundred dollars in favor of Michael Walsh. The evidence in reference to that account tends to show, that the account was a mere pretended account gotten up by the administrator to repay himself the two hundred dollars advanced by him to Michael Walsh under the mistaken idea, that

he was a distributee of the estate, and that the only way that the administrator had ever paid the account to the agent of Michael Walsh was by cancelling the debt against Michael Walsh for the money so advanced, and that the administrator procured the account to be allowed for the mere purpose of re-imbursing himself in that sum by this indirection. The court seems to have rejected the account on that ground, and we think committed no error in so doing. It is contended by the administrator, that as the second annual settlement was appealed from, in which this account had been refused, and the action of the Probate Court in the making of said settlement was reversed, that such reversal had the effect of establishing the said account, and that such judgment was final. But by an examination of the record it will be seen, that nothing was appealed from or passed on by the Circuit Court, except the order of distribution. This account was never before the Circuit Court in the trial of the appeal.

The accounts for the funeral expenses of the widow and child of the deceased were excluded on the ground, that they were properly demands against the estate of the wife of the deceased, as they were contracted after the death of Walsh.

This was a correct exposition of the law, but was technical, as all died and were buried nearly at the same time, but we cannot say the court erred. The Circuit Court certainly erred in charging the administrator with the value of the goods, which were the absolute property of the widow, and had been erroneously inventoried by the administrator, but this error was corrected by the court at general term, so that the administrator was not injured. As to the other items in the account objected to, the record is in such a confused state, that we are not able to say how the Circuit Court decided them, or whether the exceptions were allowed or not. In fact there is nothing in the record, from which we can see how any of the exceptions were decided by the court, except as we infer it, and being unable to see any substantial error in the record, the judgment will be affirmed.

Judges Adams and Wagner absent. The other judges concur.

 Powell, et al. v. Davis, et al.

FRANCIS B. POWELL, *et al.*, Defendants in Error, *vs.* ANDREW J. DAVIS, *et al.*, Plaintiffs in Error.

1. *Forcible entry and detainer—Possession—Entry—Cutting timber—Chain of evidence.*—The mere entry upon land and cutting timber is not of itself sufficient to sustain an action of forcible entry and detainer, but in connection with other circumstances it may form a very material link in the chain of evidence going to establish possession.
2. *Forcible entry and detainer—Possession—Intruder—Authority or title, lack of.*—Where a party occupies as a mere intruder, he will be confined to the land actually possessed; and where the reliance is on possession only, without exhibiting or claiming authority or title, he will be restricted to what he actually occupies.
3. *Forcible entry and detainer—Color of title—Possession of part.*—One in actual possession of a part of a tract of land, holding the whole under claim and color of title, will in law be held to be in possession of the remainder.
4. *Forcible entry and detainer—Possession of farms—Separate timbered land—Indicia of possession.*—Persons owning timbered land, situated separate and apart from their farms, who are accustomed to use it for the purpose of cutting wood and obtaining rails, exhibit such visible indicia of possession, as to authorize and justify the finding of an actual possession.
5. *Forcible entry and detainer—Possession of land, how evidenced.*—The owner is not always bound to be upon the land, either by himself or agent. An entry with the intention of permanent occupation, and clearing and fitting the land for cultivation, will be sufficient.

Error to Adair Circuit Court.

James Carr, for Plaintiffs in Error.

I. Cutting timber on land, which is the only possession plaintiffs had, is not such possession as to authorize the parties cutting to maintain an action of forcible entry and detainer. (*Bell vs. Cowan*, 34 Mo., 251; *Rouse vs. Dean*, 9 *Id.*, 301.)

II. As the plaintiffs did not enter under any color of title, they were not entitled to recover any more of said land than what they had actual possession of. (*Harris vs. Turner*, 46 Mo., 438; *Prewitt vs. Burnett*, *Id.*, 372.)

J. L. Berry and B. G. Barrow, for Defendants in Error, relied on *Miller vs. Northup*, 49 Mo., 397, and cases cited; *McCartney's adm'r vs. Alderson*, 45 Mo., 35 and cases cited; *Bartlett vs. Draper*, 23 Mo., 407; *Hoffstetter vs. Blattner*, 8 Mo., 276.

WAGNER, Judge, delivered the opinion of the court.

This was an action of forcible entry and detainer brought to recover the possession of a tract of land lying in Macon county. The case was transferred by change of venue to Adair county, and on the trial there was a verdict and judgment for plaintiffs.

Both parties claimed title to the premises, the plaintiffs under Macon county, and the defendants under the Han. & St. Joe. R. R. Co. But the only question now here for determination is, whether the plaintiffs were in such peaceable possession of the land as would enable them to maintain their action against the defendants for the subsequent ouster. It seems the land in controversy was a forty acre tract, mostly timbered, and situated some distance from plaintiff's other land.

The testimony tended to show, that plaintiffs cut wood and timber and made rails off of the land, and that they had got a man to clear up some five or six acres, and had agreed to let him have the part so cleared for a year to raise a crop on; that, while he was engaged in clearing the land, the defendants one day in his absence came upon the land, and with plank already fixed for the purpose put up a small shanty in one day, placed a tenant therein and took possession, and the next day, when plaintiffs' tenant returned to his work, he was ordered off.

As there was evidence tending to prove the issue raised by the plaintiffs, it will only be necessary to see whether the court properly declared the law.

For the plaintiffs, the court instructed the jury:

1st. That if they believed from the evidence, that the plaintiffs were at any time, within three years next before the commencing of the action, in the peaceable possession of the land in controversy, and while so possessed thereof, and before this action was commenced, the defendants without the consent of plaintiffs and against their will entered into and took possession, then they should find for plaintiffs.

2d. That, in order to constitute such possession in plaintiffs, it was not necessary that they should reside on the land

or stay there or keep agents or servants there, but that any act done by them upon the premises indicating an intention to hold the possession thereof in themselves was sufficient ; and 3rd, if the jury believed from the evidence, that plaintiffs in 1871 went upon the land in controversy with the intention of holding the same, and of clearing and fitting any part of it for cultivation, and cut and corded wood thereon, and had rails made and posts cut on the same for the purposes of fencing said land, or any part of it, for cultivation, and in the month of May, 1871, and prior to the 9th day of the month, were proceeding to have any portion of said land cleared up to have the same cultivated, then the jury were authorized to infer the actual possession of plaintiffs of the land at the time referred to, and if they should so find, and further believe from the evidence, that the defendants about the 9th day of May, 1871, entered into the possession of the said land, and withheld it from plaintiffs, and against plaintiffs' will, then they should find defendants guilty of forcible entry and detainer as charged, etc.

For the defendant the court gave the following instructions :

1st. The right to the possession is not before the jury, nor will the jury take into consideration the title, or whether Powell and Willingham or Davis has title to the land in controversy. The jury cannot take into consideration in any respect the title to the land.

2d. The entry upon a tract of land, and merely cutting timber thereupon, does not constitute a possession so as to authorize an action of forcible entry and detainer.

3d. If the jury believe from the evidence, that the plaintiffs had leased the premises in controversy to one Marmaduke, that said Marmaduke, at the time of the alleged forcible entry and detainer by the defendants, was the tenant of plaintiffs under a lease of said premises, then the right of action accrued to said Marmaduke and not to plaintiffs.

4th. If the jury believe from the evidence, that the defendants, or either of them, wrongfully and without force by disseizin obtained possession of the land sued for, and continued

in possession of the same at the time alleged in the complaint, they will find for the defendants, unless they shall further believe from the evidence, that a demand was made in writing for the deliverance of the possession thereof by the plaintiffs, their agents or attorney, before the institution of this suit, and the defendants refused or neglected to give such possession.

The defendants asked eight instructions, in addition to those given, which were refused. If the instructions given fairly declared the law and covered the whole case, then it is unnecessary to examine those refused by the court. As the title could in nowise be called in question, the controversy is narrowed to the single point, whether the plaintiffs had peaceable possession of the tract of land when they were dispossessed by the defendants.

The instructions are direct and pointed as to this matter, and we would have been pleased if the court had given less instead of more.

It is unquestionably true, that a mere entry upon land and cutting timber is not of itself sufficient to sustain an action of forcible entry and detainer. (*Rouse vs. Dean*, 9 Mo., 301; *Bell vs. Cowan*, 34 Mo., 251.)

But in connection with other circumstances, it may form a very material link in the chain of evidence going to establish possession. Where a party occupies as a mere intruder, he will be confined to the land actually possessed, and where the reliance is on possession only, without exhibiting or claiming authority or title, he will be restricted to what he actually occupies. (*Harris vs. Turner*, 46 Mo., 438.) But where one is in actual possession of a part of a tract of land and holding the whole under claim and color of title, he will in law be held to be in possession of the remainder, and actual occupancy thereof will not be necessary to entitle him to an action of forcible entry and detainer. (*Prewitt vs. Burnett*, 46 Mo., 372.)

There may be possession in fact of unimproved and uncultivated land, and persons owning timbered land situated separate and apart from their farms, who are accustomed to

use it for the purpose of cutting wood and obtaining rails, exhibit such visible *indicia* of possession, as to authorize and justify the finding of an actual possession. (Miller vs. Northup, 49 Mo., 397.)

The owner is not always bound to be upon the land either by himself or agent. An entry with the intention of permanent occupation, and clearing and fitting the land for cultivation, will be sufficient. The plaintiffs under a claim of title were clearing portions of the land, and doing the acts generally done by persons who are in the possession of their own premises. This was sufficient to take the case to the jury, and from which they might well infer an actual possession.

Being so in possession, and fitting and clearing a part for cultivation, accompanied with color of title, carried the possession to the whole tract.

The point made, that if the plaintiffs had leased the land to Marmaduke, then the injury was done to his possession, and he would be the proper party to sue, is answered by the fact that defendants placed their house outside of the land alleged to have been leased to him, and therefore plaintiffs were the parties to whom the wrong was done. This part of the case was submitted to the jury by an unexceptionable instruction at the instance of the defendants, and the verdict is conclusive.

Upon the whole record the case appears to have been fairly tried, the instructions all taken together amounted to a just presentation of the law, and the judgment should be affirmed.

Judge Adams is absent ; the other judges concur.

McCartney, Adm'r. of Samuel McCartney, et al. v. Alderson, et al.

JULIA A. MCCARTNEY, ADMINISTRATRIX OF SAMUEL MCCARTNEY, et al., Respondents, vs. BENJAMIN A. ALDERSON, et al., Appellants.

1. *Limitations, statute of*—Section 7, Wagn. Stat., 917—*Prospective*.—Section 7 of the Limitation Act (Wagn. Stat., 917) is prospective in its operation, and has no application to actions commenced, nor to cases where the right of entry accrued, before it was enacted.

Appeal from St. Charles Circuit Court.

Theodore Bruere & T. W. Cunningham, for Appellants.

I. Section 7 of the Limitation Act (Wagn. Stat., 917) evidently excepts from the operation of § 1 the class of cases enumerated in the said § 7. (Wagn. Stat., 896, §§ 2, 5.) Section 7, being incompatible with and repugnant to § 1, so far as grants to public, pious and charitable uses are concerned, restrains and repeals so much of § 1, and such repeal takes effect on the 1st of August, 1866. The common law rule of construction is the same. (Dwar. Const. Stat., 658, 765; Patterson's Dwar., 110, 117; Stockett vs. Bird, 18 Md., 484.) Whether § 7 should be considered as an exception or an amendment, the result would be the same in effect. (Holbrook vs. Nichol, 36 Ill., 161; 27 U. S. Digest, 582; Stirman vs. State, 21 Tex., 734; Fosdick vs. Perroyberg, 14 Ohio St., 472; Cox vs. Davis, 17 Ala., 714; Royce vs. Hurd, 24 Ver., 620; 1 Deane, 620; Covington vs. McNickle, 18 B. Mon., 262.) An amendment to a limitation law retroacts to the date of the original, unless otherwise expressed. (2 Min., 241; U. S. Digest, p. 362.)

Lackland & Broadhead, for Respondents.

I. The defendants are barred by the statute of limitations—(School Dir. of St. Charles vs. Goerges, 50 Mo., 194; Abernathy vs. Dennis, 49 Mo., 468; Funkhouser vs. Langkopf, 26 Mo., 453; Aubuchon vs. Ames, 27 Mo., 89; St. Louis University vs. McCune, 28 Mo., 481.)

WAGNER, Judge, delivered the opinion of the court.

McCartney, Adm'r. of Samuel McCartney, et al. v. Alderson, et al.

This was an action of ejectment to recover a certain lot of ground situated in the city of St. Charles. The lot is one of a series granted by the United States Government to the towns, in which they lie, for school purposes. The plaintiffs showed possession in themselves, and those under whom they claimed, from 1831 continuously down to 1867. This possession was accompanied with a paper title emanating from the trustees of the town. At the last named time the defendants, pretending to derive title from the school board, forcibly entered and took the possession.

It appears that in 1831 one Bellon obtained a lease for the premises from the town authorities for nine hundred and ninety-nine years, and that in 1840 he surrendered this lease, and obtained another one in lieu thereof for the same duration of time. From Bellon the title has regularly descended by a chain of *mesne* conveyances to the plaintiff. By act of Congress, approved June 13th, 1812 (2 Stat. at Large 750, § 2), the lot in question was reserved for the support of schools. By a subsequent act, approved January 27th, 1831 (4 Stat. at Large 435, § 2), the United States relinquished all their right, title and interest in and to the town and village lots, out lots and common field lots, in the State of Missouri, reserved for the support of schools, and enacted, that the same should be sold or disposed of or regulated for said purposes in such manner as might be directed by the Legislature of the State.

In May, 1857, the surveyor general duly certified, that the lot had been regularly surveyed, and designated and set apart to the town of St. Charles for school purposes, in conformity with the provision of the second section of an act of Congress of the 26th of May, 1824, being a supplement to the act of June, 1812.

By an act, approved January 27th, 1837, the Legislature of this State passed a law incorporating the city of St. Charles, the 9th section of which provides, that "all powers heretofore granted to the trustees of said town over or relating to the commons of said town are hereby vested and con-

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tinued in the board of trustees created by this act, and said board shall have power to manage, sell, lease, or otherwise regulate or dispose of, all lots of ground and all money or property, to which the inhabitants may be entitled, for the benefit of schools," etc. (Sess. Acts 1836-7, p. 309, § 9.)

A subsequent act was passed and approved February 9th, 1839 (Sess. Acts 1838-9, p. 140, §§ 3, 4), by which it was enacted, that upon the petition of a majority of the taxable inhabitants of any town or village to the County Court of their county, praying to be incorporated for school purposes, that the court might make an order for their incorporation; and that when such order was made, the inhabitants, within the boundaries designated, should be a body politic and corporate, with power to take, hold and purchase real and personal estate and sell or dispose of the same.

In 1851, the Legislature, by an act amendatory of the charter of the city of St. Charles, vested in the school directors of the city the powers which had previously been exercised by the city authorities. (Sess. Acts 1851, p. 428, § 2.)

The above are substantially the facts, and the congressional and legislative enactments adduced on the trial.

For the plaintiff the court instructed the jury, that plaintiff could not recover till they showed title by possession, and that by title by possession was meant open, notorious, adverse possession of the property in controversy for a continuous period of ten years under color of title, and that by color of title was meant a deed of record for the property to the plaintiffs or parties under whom they claimed; and that the possession of a part of a lot or tract of land under a deed or lease, calling for the whole lot, was possession of the whole lot, and if the jury believed from the evidence, that a house was on the lot described in the plaintiffs' deeds and conveyances, and that the plaintiffs, and those under whom they claim, were by themselves, or tenants, in the possession of said house under deeds or conveyances, calling for the whole lot, piece or parcel of ground, including the part in controversy, then they were in possession of the whole of said lot,

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piece or parcel of said ground, called for in the deeds or conveyances, whether the same was inclosed by a fence or not.

The court further instructed the jury, that, under and by virtue of the laws of the United States and of the State of Missouri, the trustees of the town of St. Charles had the power to lease, sell and dispose of, all lots of ground, to which the inhabitants of said town were entitled, for the benefit of schools, and if they believed from the evidence, that the lot in question was a lot to which the inhabitants of said town were entitled for the benefit of schools, and that the trustees of the town leased, disposed of, or sold, the same to Bellon in June, 1841, and that the plaintiffs had their title by genuine conveyances, then they should find for the plaintiffs.

At the request of the defendants the court gave an instruction, that the statute of limitations in the present case did not begin to run against the school board of the town of St. Charles, under whom defendants claim, until May 15th, 1857, when said lot was set apart by the surveyor-general of Missouri for school purposes. Defendants further asked the court to instruct, that plaintiffs could not avail themselves of title by possession under color of title, but this the court refused to do. The jury found for plaintiffs.

By the act of Congress of 1812 the lot here in controversy was reserved for the support of common schools, and by the subsequent act the United States relinquished all their right and title to the same, and authorized the State to sell, dispose of, and regulate, it in such manner as the Legislature might provide. After the passage of this last act the Legislature gave the trustees of the town of St. Charles full power and authority to sell and dispose of the lot. Whilst this power was in full existence the trustees did act and dispose of the lot to Bellon, under whom the plaintiffs claim. No subsequent act could impair the rights legally acquired under this power. Before the law of 1839 could become operative, so as to in the least affect the previous provision on the subject, it was necessary that the petition of a majority of the taxable inhabitants of the town should pray to be incorporat

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ed for school purposes, and that the County Court should make the order granting the request. The record does not show that this was ever done. For aught that appears, the whole matter of managing, selling and disposing of, the school property remained in the trustees of the town. The act of 1851, transferring the powers to the school directors, has no bearing on the question, as it is not shown at what time the directors were organized. If they were not organized till after the trustees had conveyed the property, whilst they had the power to convey, then of course the rights of the plaintiffs could not be impaired or affected by their organization.

The plaintiffs then present themselves in court holding the possession, and also claiming under a paper title. We have been unable to see any reasonable objection to the instructions of the court. At the instance of the defendants the court gave an instruction, that the statute of limitations did not begin to run against the school board till the 15th of May, 1857, that being the time at which the surveyor-general certified that the lot was set apart for school purposes. The jury must then have found, that, even under this view of the law taken by the defendants themselves, the plaintiffs were in possession the requisite period of ten years, before they were dispossessed and ousted by the defendants.

But it is contended, that under the 7th section of our Limitation Act (2 Wagn. Stat., 917, § 7), the statute does not run against the school board at all. This question, however, must be considered as settled and at rest. The section referred to was for the first time enacted in the Revision of 1865, and in the case of *School Directors vs. Goerges* (50 Mo., 194) we held, that it was prospective in its operation and had no application to actions commenced, nor to causes where the right of entry accrued, before it was enacted. As the plaintiffs' right here accrued before the section had any existence, it cannot be held to apply.

Upon the whole record we have failed to find any substantial error, and the judgment must be affirmed. The other judges concur.

ROBERT CAMPBELL, *et al.*, Defendants in Error, *vs.* JOHN C.
DENT, Plaintiff in Error.

1. *Partnership—Share in profits—When partners.*—The single circumstance that one is to have a share in the profits, does not necessarily make him a partner. He must have some interest in the business, or property of the business, or trade, so as to give him a lien on the property for the protection of his interests or profits, and a control over the same. The interest in the profits must be mutual; each person must have an interest in the profits as a principal trader.

Error to St. Louis Circuit Court.

Geo. P. Doan and Jecko & Hospes, for Plaintiff in Error.

I. The cause was tried on the theory, that Barrow was the agent of Dent, by reason of a partnership which existed between them. The agency should have been established before evidence of the acts of agency or partnership was received. (2 Starkie Ev., 40, §§ 41, 44; Brown vs. Bank Mo., 2 Mo., 191; Scarborough vs. Reynolds, 12 Ala., 252; McDonnell vs. Bank of Montgomery, 20 Ala., 313.)

II. No contract of agency or partnership as between Dent and Barrow themselves is proved. (Freeman vs. Bloomfield, 43 Mo., 391.)

III. There was no evidence adduced by plaintiffs to show that Dent held himself out as a partner or admitted himself afterwards to be a partner. (1 Phillips' Ev., 462, n.; Osborne vs. Brennan, 2 Nott & McC., 427; Smith vs. Wright, 1 Abbott Pr., 243; Dry vs. Boswell, 1 Campb., 329; Denny vs. Cabot, 6 Met., 82; Burekle vs. Eckart, 1 Denio, 337; Perrine vs. Hankison, 6 Halst., 181; Divinel vs. Stone, 30 Me., 384; Rapp vs. Vogel, 45 Mo., 524; 10 Am. Law Reg., 209; Story Partn., [Ed. 1868] Chap. 4, §§ 48, 49; Cox vs. Hickman, 8 House of L. C., 268, overruling Waugh vs. Carrier.)

IV. An interest in profits, given as a compensation, does not make the person receiving such interest a partner. (See cases under 2 and 3, *supra*.)

Thos. T. Gantt, for Defendants in Error.

I. There was evidence tending to prove the facts stated

hypothetically in plaintiff's instruction; and the sufficiency of that evidence to convince the jury was a matter for them, not for the court now.

II. If Dent and Barrow transacted business as post traders at Fort Fetterman, under the name of J. C. Dent & Co., Dent furnishing the permit and the use of his name to the concern, and Barrow furnishing the goods with the agreement that Dent should have a certain share of the profits, then Dent held himself out to the world as a partner, and was liable as such to all who believed him to be so. (*Waugh vs. Carver*, 2 H. Bl., 235, and cases cited in the notes; *Stearns vs. Haven*, 14 Ver., 540; 1 *Smith Lead. Cas.*; *Story Part.*, §§ 20-27; *Pars. Part.*, 48-65.) Whether such a condition of things constituted him a full partner of Barrow, as between themselves, is of no consequence. As to the world at large, they were partners and liable to all the consequences of that relation. (*Turner vs. Bissell*, 14 Pick., 192; *Miller vs. Bartlet*, 15 Serg. & R., 137.)

III. Dent permitted his name to be used as a member, and as a leading member, of the firm. The authorities of the War Department knew him alone as post-trader. The permit was to him. His name was a prime necessity to the store of the post-traders; the firm could have no existence without his name. On this ground alone he was liable. (See the cases cited above; *Chitty Cont.*, 194-5; *Chase vs. Barret*, 4 Paige, 148.) The credit was given to the firm of J. C. Dent & Co. Every element of liability, then, is united here. (*Whitehill vs. Shickle*, 43 Mo., 537.)

VORIES, Judge, delivered the opinion of the court.

This action was brought in the St. Louis Circuit Court by Robert Campbell and others against John C. Dent to recover the price of certain goods charged to have been sold and delivered to defendant, a bill of particulars of which was filed with the petition.

The petition charged, that the goods were sold to defendant (together with one John E. Barrow), and that they were delivered to and came into the possession and use of the defend-

ant, and that he has failed to pay, etc. The defendant by his answer denies every material allegation in the petition.

The plaintiffs recovered a judgment at the special term of the Circuit Court, from which the defendant appealed to the General Term, where the judgment was affirmed, and defendant has brought the case here by writ of error.

The evidence, offered and given on the trial on the part of the plaintiffs, was in substance as follows: John Nolan, a witness for plaintiffs, testified, that in the month of November, 1867, he was in the employment of plaintiffs as salesman, knew John E. Barrow, and at the date of the bill sued on was directed by plaintiffs to sell goods to Barrow, the goods set forth in the account sued on. The witness was then asked this question by plaintiffs: "State what was said and done by Barrow at the time?" Defendant objected to this question, as it was not in proof that Barrow was the agent of defendant, and that there was no such allegation in the petition. Plaintiff's attorney then stated to the court, that if it was not proved that Barrow was the agent of the defendant, plaintiffs would not ask for a verdict. The court then overruled the objection made to the evidence, to which ruling of the court the defendant excepted. The witness then said, that Barrow directed him to make out the bill to J. C. Dent & Co., to have the boxes, in which the goods were packed, marked to J. C. Dent & Co., Fort Fetterman, which was done. The goods were charged in the sale book to J. C. Dent & Co. On cross-examination witness stated, that he did not know defendant, never had any conversation with him, that what he had said was what Barrow told him; had sold Barrow goods before, but he was not then in good credit; witness did not ship the goods himself or see them shipped.

It was testified by Hugh Campbell, one of the plaintiffs, that at the time of sale, or a few days before, Barrow told witness, that defendant had a permit to trade at Fort Fetterman, a military post in the Indian County, and that Barrow wanted to purchase goods for that purpose, and the goods were sold at the time named. At the time of the sale witness did not

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know defendant. Some months after the sale, witness heard a conversation between Robert Campbell, the other plaintiff, and defendant, in which defendant said he was not in partnership with Barrow, and was not liable to plaintiffs for the goods sold to him, but that defendant admitted, that he was interested in the profits of the adventure. Witness stated, that he could not state the words used by defendant, but he admitted that he was interested in the profits. Barrow had purchased of plaintiffs frequently on his own credit, and had paid for the purchases. Witness stated that he did not, at the time the goods were sold, know anything of the financial standing or responsibility of defendant, made no inquiry in reference thereto. Barrow told witness, that defendant had several permits to trade. The bill of goods sued for was settled by taking Barrow's individual note therefor; did not know why it was so settled, would not have so settled it, if witness had known it. The goods sued for have not been paid for. Barrow was sued on the note, judgment obtained, but it had not been paid. David Rankin testified to the same conversation related by Campbell, and also testified, that he was clerk for plaintiffs, and that they had frequently sold Barrow goods before on his own credit.

The foregoing, is all of the evidence offered or given by the plaintiffs. At the close of this evidence, defendant moved the court to instruct the jury, that there was no evidence before them which sustained the allegations of the plaintiffs' petition. The court refused said instruction, to which the defendant excepted. The defendant then read in evidence the deposition of John E. Barrow, which was in substance: That he had known plaintiffs for ten or fifteen years past; he had purchased goods from them frequently; that the last purchase was made in Nov., 1867, the bill sued for; the goods were shipped and sent to Fort Fetterman, Dakota Territory; that he bought them for himself; defendant was not present at the time of the purchase; defendant did not authorize witness to use his name; that witness bought the goods on his own responsibility; defendant had the permit from the

government to trade at Fort Fetterman, that witness had no permit, and could not trade there except under Mr. Dent's name; that his recollection was, that he had explained this matter to the clerk and Hugh Campbell at the time he purchased the goods, and that he bought the goods on his own responsibility, and that defendant had a certain share in the profits; this share was one-fourth of the profits for the privilege of trading under his permit; no profits were made, but a loss; defendant was not to share in the loss. On cross-examination witness stated, that he told the clerk, that he bought the goods for himself under defendant's permit as a trader, and thought he had told Hugh Campbell the same; that the firm of John C. Dent & Co. was composed of witness individually, and he ordered the goods to be shipped to John C. Dent & Co., and gave the direction about shipping; Spencer disposed of the goods, and was to have one-fourth of the profits for his management. Witness stated, that defendant did not authorize him to use his name in the purchase of these goods under his permit; the fourth of the profits to defendant was a compensation for the use of his permit.

The plaintiff introduced evidence in rebuttal, to the effect, that Barrow had not told Nolan and Campbell, that he purchased the goods on his own account to sell under Dent's permit. This was all of the evidence.

The court then, at the request of the plaintiffs, instructed the jury as follows:

"If the jury believe from the evidence, that the defendant and one John E. Barrow were in November, 1867, engaged in business as post traders at Fort Fetterman, in the Indian Territory, under the name and style of J. C. Dent & Co., the said J. C. Dent being the defendant; that the terms of their partnership were as between themselves, that the said J. C. Dent should procure the permit from the United States authorities to sell goods at that post, that Barrow should furnish the capital, and that the profits of the business should be divided in any proportion between them; that Barrow brought the goods mentioned in the plaintiff's petition from the plain-

tiffs, and directed them to be shipped to J. C. Dent & Co. at Fort Fetterman, marked as the property of J. C. Dent & Co.; that plaintiffs shipped them as directed; that Barrow gave his note for the amount of the goods, which has become due and is unpaid; that the goods were at the time of the sale charged by the plaintiffs in their books to J. C. Dent & Co., and not to Barrow alone, and that there was no agreement between Barrow and the plaintiffs, that they should not charge the said J. C. Dent & Co. therewith, then they will find for the plaintiffs the value of the goods sold and interest from the commencement of this suit."

The defendant objected to this instruction, and, the instruction being given by the court, he excepted.

The defendant asked the court to give the jury several instructions, which, as the case is presented here, it is not necessary to notice. A verdict was returned by the jury in favor of the plaintiffs for the amount of plaintiffs' account with interest. The defendant filed a motion for a new trial, stating as grounds thereof the rulings of the court excepted to, which was overruled, and final judgment rendered, when defendant again excepted.

The motion for a new trial, in addition to other causes, set forth, that the defendant had discovered new evidence, which was material in the cause, since the rendition of the verdict. The motion was accompanied by affidavits and counter-affidavits filed by the plaintiffs; none of these affidavits need, however, be noticed in the consideration of the cause.

The material questions growing out of the record in this case are, first, as to the propriety of the ruling of the court in admitting what Barrow said and did, at the time that he purchased the goods, to be given in evidence; and second, as to the legality of the instruction given by the court at the request of the plaintiffs. Both of these questions are to some extent involved in the first; for if the evidence referred to was improper, then of course the instruction has nothing to support it. As a general proposition the acts and statements of one, who is charged to be a partner of another, cannot be

given in evidence against such other person to bind him, until the partnership has first been proved. The acts and statements of one partner against another are received in evidence in reference to matters connected with the business of the partnership, on the ground that each partner is the agent of the other in reference to such business, and in all such cases the agency must be proved by other evidence, before such acts and statements of the agent can be received in evidence against his principal. (2 Greenlf. Ev., § 484; 2 Starkie Ev., 588, [6 Am. Ed.]; Brown vs. Bank of Mo., 2 Mo., 191; Scarborough vs. Reynolds, 12 Ala., 252, and cases cited.) At the time that the acts and declarations of Barrow were offered in evidence in this case, no evidence had been offered to prove the existence of a partnership between Barrow and defendant or other agency on the part of Barrow; but the plaintiffs' attorney informed the court, that he would prove the agency afterwards. The court permitted the evidence, and the question is, did the plaintiffs produce evidence of agency sufficient to authorize the statements and the acts of Barrow to be received as against defendant? The only evidence offered by plaintiff, which tended to prove the partnership or agency, was the admissions of defendant as testified by Hugh Campbell. This evidence was as follows: "Some months after the sale I heard a conversation between Robert Campbell, the other plaintiff, and defendant, in which defendant said he was not in partnership with Barrow, and was not liable to us for the value of these goods; but defendant admitted, that he was interested in the profits of the adventure." The witness could not tell the exact words used. Another witness heard the same conversation, and this is all of the evidence, which either proved, or tended to prove, partnership or agency, offered by plaintiff, except the acts and statements of Barrow. It is contended by the plaintiffs that one, "who takes the general profits of a partnership, must of necessity be made liable for its losses," and "he, who lends his name as a partner, becomes as against all the rest of the world a partner." If we exclude the statements and acts of Barrow, we will find no evidence to

prove, that defendant ever lent his name as a partner with Barrow in the purchase of these goods. The plaintiff must rely in this case for evidence, that defendant was the partner of Barrow, so as to make acts and statements of Barrow bind him, on the single fact, that defendant admitted in a conversation with Robert Campbell, after the purchase of the goods, that he was interested in the profits of the adventure, which admission was coupled with a positive denial that he was a partner of Barrow, or that he was liable for any of his purchases.

It is true, that in the case of *Waugh vs. Carver*, 2 H. Bl., 247, 2 Vol., Part II, Smith's Leading Cases, 674, and in other cases referred to, it has been held, that one, who receives a share in the general profits, is liable as to third persons for the losses and debts contracted in the prosecution of the business; and it is upon this principle, as stated in that case, that the plaintiff seems to rely for a recovery in this case. The rule laid down in *Waugh vs. Carver* has not been adhered to either in England or in this country, but a rule more in harmony with reason and justice has been generally adopted.

Judge Story in his work on Partnership, in treating of this subject, states, "In short, the true rule *ex aequo et bono* would seem to be, that the agreement and intention of the parties themselves should govern all cases. If they intend a partnership in the capital stock, or in the profits, or in both, then that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And on the other hand, if no such partnership were intended between the parties, then that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons." (Story Part. [6th. Ed.], § 49 and note, where the authorities are discussed.) In order to constitute a communion of profits between the parties, which shall make them partners, the interest in the profits must be mutual; each person must have an interest in the profits as a principal trader. It is not enough, that one shall receive a portion of the profits as a com-

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pensation for services, but he must have some interest in the business, or property of the business, or trade, so as to give him a lien on the property for the protection of his interests or profits, and a control over the same. The single circumstance, that he is to have a share of the profits, does not necessarily make one a partner so as to bind him by the acts or admissions of one who carries on the business. (*Burckle vs. Eckart*, 1 Denio, 337; *Denny vs. Cabot*, 6 Metc., 82; *Turner vs. Bissell*, 14 Pick., 192; *Divinel vs. Stone*, 30 Me., 384.)

The case of *Wiggins vs. Graham*, decided by this court at the last October Term (51 Mo., 17), was an action brought by a clerk, who was by his contract of employment to receive a portion of the profits of the business for his services. Judge Adams, in delivering the opinion of the court in that case, held, that the clerk and his employer were not partners, either as between themselves or as to third persons. From these authorities it will be seen, that one, who receives a part of the profits, is not necessarily a partner, even as to third persons, and in the present case the statement of the defendant given in evidence must all be taken together, in which he denied that he was a partner, but admitted, that he had an interest in the profits; this he might have and still not be a partner. I therefore think, that there was not enough evidence of a partnership to authorize the statements and acts of Barrow to be given in evidence against defendant, and that defendant's instruction at the close of plaintiffs' evidence ought to have been given. It follows that the instruction given in favor of the plaintiffs was improper.

For these reasons the judgment of the Circuit Court must be reversed. Judge Sherwood not sitting, the other judges concurring, the judgment is reversed and the cause remanded.

VORIES, Judge, delivered the opinion of the court on the motion for a re-hearing:

The counsel for the defendants in error has filed his petition for a re-hearing of the cause, and seems to think, that in the opinion of the court it is held, that a person may hold

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himself out to the world as a partner in a partnership firm, and still not be liable to third persons for debts contracted in the business of the firm, unless he is actually a partner. By a careful examination of the opinion of the court, it is thought the learned counsel for the defendants in error will see that no such doctrine is held by the court. What is held by the court is, that the mere reception of a portion of the profits does not necessarily make one, who receives it, a partner in the business, and that the evidence in the cause did not show, that the defendant had ever held himself out as a partner of Barrow, or authorized Barrow to do so, so as to bind him by the acts and statements of Barrow, and that, therefore, the acts and statements of Barrow were improperly admitted in evidence against the defendant, and that without such statements there was no evidence to charge the defendant, or authorize a verdict against him. For that reason the instruction, asked for by the defendant at the close of the plaintiffs' evidence, ought to have been given.

We see no reason to change this view of the case. The petition for a re-hearing is therefore overruled.

Judge Napton did not sit; the other judges concur.

—o—

**THE QUINCY, MISSOURI AND PACIFIC RAILROAD Co., Appellant,
vs. WARREN J. KELLOGG, et al., Respondents.**

1. *Railroads—Lands, condemnation of—Substantial compliance with the law.*—When the law, concerning condemnation of lands for railroads (Wagn. Stat., 326, Art. 5), is substantially complied with, and a sufficient certainty is used to prevent surprise, or so much as not to mislead, it is all that the law requires.
2. *Railroads—Lands, condemnation of—Notice to owners.*—A notice to parties of proceedings to condemn their land for railroads (Wagn. Stat., 327, § 2), which informs them that commissioners are to be appointed to assess damages to them accruing from the passage of the road over their lands, describing the lands, is sufficient, inasmuch as they cannot be mislead.
3. *Railroads—Lands, condemnation of—Petition for—Report of commissioners—Description of land.*—A petition for the condemnation of lands for a railroad (Wagn. Stat., 326-7 § 1,) stated, that the railroad had been finally located

through the land of the defendant, and that stakes had been driven along the centre of the track where it passed over his land, that the strip intended to be occupied was 100 feet wide running in a north west direction across his land (giving the numbers of the land according to the Government surveys), and that a profile and plat of the road as located had been made and filed in the office of the clerk of the county. The report of the commissioners followed, the description in the petition, and referred to the profile and plat filed as furnishing a more specified description. *Held*, that the description was sufficient.

4. *Statute, construction of—Lands, condemnation of, for railroads—Joinder of defendants.*—The provision of the Statute (Wagn. Stat., 328, § 5) authorizing the joinder, as defendants, of those persons living in the same County or Circuit, in proceedings to condemn lands for railroads, is equivalent to saying that other persons, not residing in said County or Circuit, cannot be joined with them.
5. *Railroads—Lands, condemnation of—Improper joinder—Estoppel.*—If a party, improperly joined with others in proceedings to condemn lands for railroads, should appear and take any steps in the case without objecting to such misjoinder, or should, after the damages were assessed, receive the amount assessed, he might be estopped from objecting to the validity of the proceedings.

Appeal from Adair Circuit Court.

James M. De France, for Appellant.

- I. The proceedings for condemnation of the land were according to the statute.
- II. The authorities cited by respondent have no application here.

Ellison & Ellison, for Respondents.

- I. The respondent, being a non-resident, was improperly joined in the same petition with other non-resident and resident defendants. (Wagn. Stat., 328, § 5.)

II. The petition and order of publication and report should have described the land "which the Company seeks to acquire" by describing it exactly; as described, the appellant can shift its course and do respondent great injury. (Wagn. Stat., 326, § 1; 22 Ill., 399, which explains what the description should be.)

VORIES, Judge, delivered the opinion of the court.

This was a proceeding commenced by the plaintiff, in the Adair Circuit Court, under the fifth article of the statute of this State concerning corporations, for the purpose of condemn-

ing or appropriating lands for the road-bed of a railroad to be constructed by plaintiff.

The proceeding was commenced against defendant Kellogg, and between fifteen or twenty other defendants; all of whom resided in the County, or Circuit, where the proceeding was commenced, but said defendant, Kellogg, and two others, who were non-residents of the State. The resident defendants were personally served by summons, and publication made against the non-resident defendants. At the time fixed for the appearance of the parties the plaintiff appeared, and the court not then having time to hear the case, the hearing was postponed for three days, at which time the petition was heard, and commissioners appointed to view the land proposed to be taken by the plaintiff, and assess the damages to the several defendants through whose land the road had been located, the defendant Kellogg having made no appearance.

The commissioners afterwards viewed the different tracts of land proposed to be appropriated by the plaintiff, and made and filed their report, in which they assessed damages to defendant Kellogg to the amount of sixty-two dollars.

The defendant Kellogg appeared after the filing of this report for the first time, and filed his exceptions to the report, which were as follows:

1st. That he had not been lawfully or properly, notified of the application or petition to be made for the appointment of the commissioners: 2nd. Because none of the allegations in the petition had been proven or proof thereof waived: 3rd. Because the commissioners were not appointed on the day that the defendants were notified to appear: 4th. No instructions were given the commissioners in the order appointing them as to their duties under the law: 5th. Because the compensation given by the commissioners was not just or sufficient: 6th. The land appropriated is not sufficiently described: 7th. The petition and proceedings unlawfully joined resident and non-resident defendants in the same proceeding contrary to the laws of the State.

The court, upon a hearing of these objections, set aside the

report of the commissioners, and dismissed the proceedings as to said Kellogg; to this action of the court, the plaintiff excepted, and has brought the case to this court by appeal.

The only points discussed by the parties in this court are as to the sufficiency of the petition and the publication made against the non-resident defendants; and whether the defendant Kellogg was improperly joined in the petition with the resident defendants.

It is objected, that the petition and notice do not sufficiently describe the land to be condemned.

The petition shows, that the railroad had been finally located through the lands of the defendant, and that stakes had been driven along the center of the track where it passed over defendant's land, that the strip intended to be occupied was one hundred feet wide running in a north west direction across defendant's land (giving the numbers of the land according to the Government surveys), and that a profile and plat of the road as located had been made and filed in the office of the County Clerk for Adair County. The report follows the description in the petition, and refers to the profile and plat filed as furnishing a more specific description. We think the description is sufficiently certain and a substantial compliance with the law.

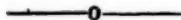
When the law is substantially complied with, and a sufficient certainty is used to prevent surprise or such certainty as not to mislead, it is all that the law requires. The notice we also think was sufficient; it notified the defendant that commissioners were to be appointed to assess damages to him for the passage of the road over his land, describing the land by its usual description; this could not mislead him as to the objects of the petition. (Quincy & Palmyra R. R. Co. vs. Taylor, 43 Mo., 35.) The objection, that the defendant, a non-resident, was joined in the same proceedings with other defendants, who resided in the County and Circuit where the proceedings were had, we think was well taken. The first section of the statute, under which this proceeding was had, provides, that the owners of all such lands, as lie within the County or Circuit, shall be made par-

State to use of Early v. Chamberlin, et al.

ties defendant by name, etc. And the fifth section of the same act provides, that "Any number of owners, residents in the same County or Circuit, may be joined in one petition, and the damages to each shall be separately assessed by the same commissioners." The meaning of this fifth section is not very clear, but as the Legislature has expressly authorized, that those residing in the County or Circuit may be joined, it would seem to be equivalent to saying, that, where they did not reside in the County or Circuit, they should not be joined.

It is difficult to see how the defendant could be injured by being joined with the other defendants, but we do not feel at liberty to disregard the statute where the intendment seems plain, particularly in cases like this, where the proceeding is to obtain title to land by virtue of a special statute without the consent of the owner. If the defendant in such a case should appear, and take any steps in the progress of the case without making any objection as to the joinder of the other parties, or if he were, after damages were assessed, to receive the amount assessed, he might be estopped from afterwards making this objection; but in this case the defendant at the first opportunity urged his objection, and the court sustained the objection, and dismissed the proceedings as to him.

The judgment will be affirmed. Judge Adams absent; the other Judges concur.



STATE OF MISSOURI, to the use of JAMES G. EARLY, Respondent, vs. THOMAS D. CHAMBERLIN, et al., Appellants.

1. *Attachment bond—Suit on—Seal.*—A seal or a scrawl by way of seal, is an essential requisite to an attachment bond filed in the Circuit Court.
2. *Practice, civil—Trials—Evidence—Bonds—Lack of seal, how objected to—Pleadings.*—When suit is brought on a bond executed by the defendant, the objection to its introduction in evidence, on the ground that there is no seal to it, will not be considered, unless its execution was denied in the answer under oath. (Wagn. Stat., 1046, § 45.)

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*Appeal from St. Charles Circuit Court.**L. J. Dryden & E. A. Lewis*, for Appellants.

I. The instrument sued on as a bond was not admissible in evidence. It was not a bond, having neither a seal nor a scrawl. (1 Bouv. Law Dic., 200; Drake Attach., § 125; Moreau vs. Detchemendy, 18 Mo., 522; State vs. Thompson, 49 Mo. 188; Grimsley vs. Riley's Admr., 5 Mo., 280.)

Frank T. Williams, for Respondent.

I. The only form prescribed by statute for attachment bonds does not require a seal nor scrawl thereon. (Wagn. Stat., 194, § 68.) This form is prescribed for actions before justices of the peace, but the principles and formula in attachments there are the same as in other courts.

II. The principal cannot take advantage of the omission, nor of any other defect in the bond, after having had the advantage of it. (Drake Attach., § 124.)

ADAMS, Judge, delivered the opinion of the court.

This was an action on an attachment bond, which had been executed by the defendants in an attachment suit in the Circuit Court against the plaintiff.

The only question discussed here is, whether the attachment bond was not a nullity, because it was not sealed, either by affixing the common law seal by a tenacious substance, or by a scrawl by way of seal as allowed by our statute.

In State *ex rel.* West vs. Thompson, 49 Mo., 188, this court held an attachment bond, given under the landlord and tenant act, void for want of a seal.

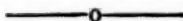
In ordinary attachment suits before a justice of the peace the seal is omitted in the form prescribed by the statute.

This attachment, however, was commenced in the Circuit Court, and it may be conceded that, under the ruling laid down in the case referred to, a seal was necessary to make this a good bond. If that be so, the seal, or a scrawl by way of seal, was an essential requisite to its proper execution. But this point is not presented by the record. The answer of the

defendants did not deny the execution of the bond under oath. Where an action is founded on an instrument of writing, charged to have been executed by the defendant, and not alleged to be lost or destroyed, its execution must be taken as confessed under our code of practice, unless he deny the execution by answer verified by affidavit. The language of the statute is: "When any petition or other pleading shall be founded upon any instrument of writing, charged to have been executed by the other party, and not alleged therein to be lost or destroyed, the execution of such instrument shall be adjudged confessed, unless the party, charged to have executed the same, deny the execution thereof by answer or replication, verified by affidavit." (2 Wagn. Stat., 1046, § 45.)

As the defendants' answer was not verified by affidavit, it amounted to a confession, that the attachment bond was duly executed, that is, that it was properly sealed and delivered. Under the pleadings it was not necessary to produce the bond in evidence at all, and therefore it is not properly before this court for any purpose.

Let the judgment be affirmed. The other judges concur.



A. SUMNER, Plaintiff in Error, vs. GEORGE W. AND C. L. SUMMERS, Defendants in Error.

1. *Contracts—Illegality—Void.*—A contract is void, when the consideration is illegal, in whole or in part, and it is immaterial, whether the contract disclosed such illegality, or it be established *aliunde*.
2. *Notes and bills of exchange—Criminal prosecution, dismissal of—Indebtedness.*—A note given to secure the dismissal of a criminal prosecution for embezzlement, whether the agreement be express or implied, is void, although it is made for the amount of money alleged to have been embezzled.

Error to Montgomery Circuit Court.

Fagg & Dyer, for Plaintiff in Error.

I. The note was for the exact amount of the defendant's indebtedness to the plaintiff at the time it was given. The

plaintiff could secure this indebtedness without compounding a felony—and it is not compounding a felony to dismiss a prosecution, unless paid or agreed to be paid therefor.

II. In the authorities cited by defendants, a careful examination of them will show that they are not in point, nor in anywise analogous to this. In the case referred to in 44 Mo., 29, it will be seen, that a bond was given, in the body of which is expressed the fact of the embezzlement itself; and it was clearly shown, that the bond was given for no exact amount, nor did the parties know (as plaintiff did in this) the amount of the indebtedness. It was given to procure the release of Cook from a criminal prosecution, and not for money at that time ascertained and acknowledged to be due and owing, as in this case.

Saunders & Carkener, for Defendants in Error.

I. The compromise of a criminal prosecution is an illegal consideration, and a promise based upon it is void. (*Cheltenham Co. vs. Cook*, 44 Mo., 29; *Featherston vs. Hutchinson*, 1 Cro. Eliz., 199; *Waite vs. Jones*, 1 Bing., [N. C.] 656; *Shackell vs. Rosier*, 2 Bing., [N. C.] 634; *Howden vs. Haight*, 11 Ad. & El., 1033.)

II. If a part of the consideration was an agreement, either express or implied, to dismiss or suppress a prosecution for embezzlement then pending, such agreement taints the entire transaction, and renders the deed void *in toto*. (Vide Authorities cited *supra*, and 9 Ad. & El., 371; *Clark vs. Ricker*, 14 N. H., 44; *Gardner vs. Maxey*, 9 B. Monroe, 90; *Town of Hinesburgh vs. Sumner*, 9 Ver., 23; *Bell vs. Wood's Admr.*, 1 Bay, 249; *Den vs. Moore*, 2 South., 470; *Badger vs. Williams*, 1 Chip., 137; *Raguet vs. Roll*, 7 Ohio, 76; *Shaw vs. Spooner*, 9 N. H., 197; *Steuben Bank vs. Mathewson*, 5 Hill, 249; 22 Amer. Jur., 23, 24.)

SHERWOOD, Judge, delivered the opinion of the court.

Action on a sealed note, or writing obligatory, for the sum of \$790.30, dated September 9th, 1870, due in twelve months,

and with two credits of that date indorsed thereon, one for \$37.15 and the other for \$75.00.

The petition mentions these credits, and states, that the defendants were entitled to them on the day the note was given.

The defendants filed separate answers. The father, C. L. Summers, admitted that he executed the note as the security of his co-defendant and son, George W. Summers, but denied that he owed the plaintiff the amount then due thereon, \$678.15, or any other sum, and, as the grounds of his non-liability stated, that one W. B. Watson was the agent of A. Sumner & Co., of which plaintiff was the chief and managing member, which firm was the proprietor of the Wheeler & Wilson sewing machine; that Watson, as such agent, instituted a criminal proceeding against George W. Summers for embezzlement, charging him in his affidavit, dated September 8th, 1870, with having embezzled and converted to his own use certain sums of money, amounting to the sum of \$787.55, belonging to said firm; that on the 9th day of September, 1870, George W. Summers was arrested by virtue of a warrant procured by said Watson, and issued upon the filing of said affidavit; and that said amount was charged to have been collected by said George W. Summers, while acting as the agent of said firm, in the year 1869, that, while said criminal prosecution was still pending before the justice, who issued the warrant, Watson made an agreement with the defendant, George W. Summers, that if he would execute his obligation in writing to plaintiff for \$790.30, payable twelve months after date, &c., and procure the signature of his father, C. L. Summers, thereto, and deliver the same to said Watson, that he, Watson, would immediately discharge said George W. Summers, and dismiss, suppress and abandon the prosecution against him; that George W. Summers complied with the proposition of Watson, signed such a note, and procured the signature of his father thereto, as security, and delivered the note to Watson, who thereupon, and in fulfillment of his promise and agreement, did dismiss, abandon and suppress

the prosecution ; that the dismissing and suppressing of the criminal prosecution was the sole and only consideration of the note, and that the same was illegal and void.

The answers of the defendants were in the main alike, except that the answer of the defendant, George W. Summers, stated, that he did not owe the firm of Sumner & Co., or plaintiff, the sum of \$787.55, nor had he converted to his own use, or embezzled, that sum ; that there was, at the time of executing the note, an unsettled account between the firm and himself ; that, his books and papers having been destroyed by fire, that firm attempted by means of the criminal prosecution to compel the defendant to settle on their own terms ; that defendant refusing to do so, the prosecution was instituted, which was abandoned and he discharged upon complying with the proposition and agreement with Watson, &c.,

Replies, controverting the allegations contained in these answers, were duly filed, and the cause went to trial ; at which evidence was introduced, tending to support the defenses set up in the answers, and also to show, that George W. Summers was indebted to the firm of Sumner & Co., for about the amount specified in the note.

At the conclusion of the testimony the court, at the instance of the defendants, gave two instructions ; one which defined, and rightly defined, what is meant by the pendency of a criminal prosecution ; and the other, of which complaint is chiefly made, was in these words : "If the jury believe from the evidence, that one W. B. Watson, acting as the agent of the firm of A. Sumner & Co. (of which plaintiff is a member) for the settlement of a claim of said firm against defendant George Summers, made an affidavit before Ford Herve, a justice of the peace of Bear Creek township, Montgomery county, Mo., charging said defendant with the crime of embezzling \$787.55 of the money of said firm, and that thereupon a warrant was issued by said justice for the arrest of said defendant upon said charge, and that thereafter to-wit : On the 9th day of Sept., 1870, and while said criminal prosecution was still pending and undisposed of, the obligation

sued on was executed by defendants, upon an agreement or understanding, either expressed or implied, between said Watson and said defendants, that said Watson would suppress or abandon said prosecution, or abstain from the further prosecution of said charge, then said obligation is void, and the jury must find for defendants, notwithstanding they may further believe, that said obligation was given for said sum of \$790.30, as the alleged indebtedness of defendant George Summers to said firm, and for the additional purpose of securing the payment of said sum to plaintiff's said firm; and notwithstanding they may further believe from the evidence, that at the time of the execution of said obligation, or at any time thereafter, defendants, or either of them, promised to pay the same." And this case hinges therefore upon the propriety of giving this instruction.

Points, nearly akin to those involved in this record, were discussed by this court in *Cheltenham Fire Brick Co. vs. Cook*, 44 Mo., 29. In that case a bond was executed by T. F. Cook and I. Cook, to the plaintiffs, in which was recited that T. F. Cook had improperly appropriated to his own use certain moneys of an unknown amount, and that plaintiffs were willing and consented to give him thirty days time in which to make up the deficit, and conditioned that said Cook should pay, or secure, the same to the satisfaction of the plaintiffs within that time, provided that the sum thus to be paid or secured should not exceed the sum of \$4,500 in so far as Isaac Cook was concerned. Suit was brought on this bond, and the petition averred, that T. F. Cook was in arrears to the amount of \$16,000. The answer set up, that the bond was illegal and void; and that it "was executed while said Theodore was under arrest, and in consideration of the agreement of said Howard (the agent of plaintiff) to discharge him therefrom, and to suppress and abandon said criminal proceedings." And it was held, that the answer set up a good defense; and that if the facts thus alleged were established by proofs, it defeated the plaintiff's action.

There was a conflict of testimony on the point, as to wheth-

er any direct promise was made by Watson in this case to release George Summers from arrest; some of defendant's testimony being to that effect, but contradicted by the plaintiff's witnesses. But there was not a particle of controversy about the fact, that it was the understanding among all the parties to the transaction, that all prosecution was to cease upon the execution of the note; and that upon such execution that result did immediately follow. The justice, Ford Hervey, who in violation of his official oath lent himself to the shameful and unlawful abuse of legal process, says: "The matter was dropped at once on the note being signed, and Watson got into the buggy and started for St. Louis," &c. "I did not require any return on the warrant, because the prosecution was settled." And the constable says, "as soon as the note was executed, George Summers was released, and Watson took the note, and started for St. Louis. I made no return on the writ, because I considered the matter settled."

The witness, Watson, although denying most emphatically that any promises were made to defendants, or either of them, yet says, that he got out the warrant for the purpose of sending George Summers to the penitentiary, and that he "had no other object in view;" that "George was discharged as soon as the note was executed. Nothing was said about giving up the prosecution, but it was understood, that the matter would be dropped. I would have objected to the discharge of the defendant, George, if the note had not been given."

No wonder the jury came to the conclusion, at which they evidently arrived, that there must have been an agreement, either expressed or implied, that George Summers was to be released as soon as the note was executed, and it would tax to the utmost credulity itself to believe that such a thorough and perfect understanding could have been reached without some words having been employed to convey that material information. But it is unnecessary to discuss the evidence; it tended to establish the defense set up, and that is sufficient; as we have just seen from the case above cited, that the answer contained a good defense, it would seem to logically fol-

low, that an instruction to the jury, hypothecated upon a state of facts sufficient to establish the allegations of that answer, could not be erroneous.

Counsel for appellant however attempt to draw a distinction between the present case and that of the Cheltenham Fire Brick Co. vs. Cook, *supra*. It is not perceived what substantial difference or distinction there is between the two cases. It certainly could not, as counsel suggest, consist in the fact, that a sum certain was acknowledged to be due in the one case and not in the other; nor in the fact, that the note in this case was given for a specified amount, and the bond in that to secure the payment of a sum which was as yet unascertained: nor in the fact, that the note on its face bore no *indicia* of the consideration which moved its execution, while the bond showed a wrongful mis-appropriation of money. For if the consideration of any contract, either in whole or in part, be illegal, this defeats the entire contract, and it is wholly immaterial, whether the contract discloses such illegality, or it be established by evidence *aliunde*; the principle is the same in either event. It is the agreement, either express or implied, to abstain from prosecution, or to dismiss a prosecution already begun, which taints the whole transaction and avoids the contract. And it can make no sort of difference, whether a sum certain, or one in the future to be ascertained, is made the basis of the iniquitous agreement. As the court in Collins vs. Blantern, 2 Wils., 341, the leading case on the subject in England, say, "You shall not stipulate for iniquity." The law will not tolerate such agreements. The public has an interest, that those guilty of crime should be punished, and any stipulation, designedly frustrating such prosecution, will not be permitted to stand.

For these reasons the instruction was correct, and as those given on the part of the plaintiff were fully as favorable as he had any right to demand, the judgment with the concurrence of the other judges will be affirmed.

Chesley v. Chesley, et al.

ELIZA A. CHESLEY, by her next friend, JOHN R. SELF, Respondent, vs. JOHN B. CHESLEY, et al., Appellants.

1. *Husband and wife—Witnesses for each other—Agency.*—The husband is admissible as a witness in behalf of his wife concerning matters wherein he acted as her agent.
2. *Mortgages and deeds of trust—Sale of property en masse—When set aside.*—A trustee's sale of land *en masse*, under deed of trust will not be set aside, because the land was capable of easy division, unless the interests of the grantor were sacrificed by such sale.

Appeal from Hannibal Court of Common Pleas.

James Carr, for Appellants.

I. John B. Chesley was not competent to testify for the respondent, because he was her husband, and because his co-defendants did not consent to his testifying.

II. The sale can only be set aside on the ground of fraud or mistake. Neither of which is established by the evidence in this case. (Carter vs. Abshire, 48 Mo., 300; Taylor's Heirs vs. Elliott, 32 *Id.*, 172; Stine vs. Wilkson, 10 *Id.*, 75; Sto. Eq., § 244 *et seq.*; Meir vs. Zelle, 31 Mo., 331; Rector vs. Hartt, 8 *Id.*, 448; Hammond vs. Scott, 12 *Id.*, 8; 12 Mo., 9; Chouteau vs. Nuckholls, 20 *Id.*, 442.)

Thomas H. Bacon, for Respondent.

I. The property at time of sale being in actual sub-divisions, that is to say, in (adjoining) parcels distinct enough for separate sales, (Rowley vs. Brown, 1 Binney, 61,) and distinctly marked for separate and distinct enjoyment from the time of the mortgage to the time of the sale, (Woods vs. Monell, 1 John. Ch., 502,) the sale will, as a sale in gross, be set aside on mere grounds of public policy. (Jackson vs. Newton, 18 John., 355.) And moreover, the property being then susceptible of propable separate vendue, (Am. Ins. Co. vs. Oakley, 9 Paige, 259,) and for probably more than was realized, (Mohawk vs. Atwater, 2 Paige, 54,) and there being at the very sale an opportunity of actual separate vendue, (Sumrall vs. Chaffin, 48 Mo., 402; Slater vs. Maxwell, 6 Wall., 268,) the sale will also, as a sale in mass, be set aside because of the damage therefrom presumed. And moreover, there being at

the very sale in question an opportunity of actual separate vendue for more than was realized, (Carter vs. Abshire, 48 Mo., 300,) and not only for more, but for a great deal more than was realized (Chesley vs. Chesley, 49 Mo., 540), the sale will, *a fortiori*, as a lumping sale, be set aside because of actual and great damage proved.

SHERWOOD, Judge, delivered the opinion of the court.

This was a suit to set aside a sale made under a deed of trust, and to redeem the land sold thereunder.

During the progress of the trial of the cause, John B. Chesley was called as a witness, and, against the objections of his co-defendants on the ground that he was the husband of her for whose benefit the suit was brought, was permitted to testify, so that his testimony, which was expressly excluded by the court in determining the rights of the parties litigant, might be, if necessary, considered by this court, if held competent.

Except as modified by statute, husband and wife cannot ordinarily be witnesses for or against each other. However, even at common law, the wife might testify in her husband's behalf when employed as his agent in any given transaction. And by parity of reasoning, the husband would not be incompetent as a witness in behalf of his wife, when acting for her in a similar capacity. And this was just the relation, which the witness objected to, bore to his wife, as he was her trustee, created such in order to defend and subserve her interests by the very instrument which vested in her the equitable title to the property in controversy. It was thus the duty of the husband to guard the interests of his wife, to act as her agent, and all the usual consequences, which flow from agency in other cases, would attend the agency in question, and render the husband a competent witness. So whether his testimony did, or did not, influence the court in arriving at the determination to which it came, is entirely immaterial. Besides the testimony of the husband may be altogether disregarded, and still there is ample evidence to sustain the finding of the court below.

When this cause was here before, Judge Wagner, in delivering the opinion of the court, remarked :

"The evidence establishes most conclusively, that the property was easily susceptible of division, and that it would have sold for a great deal more, had it been divided and set up in three several parcels. The houses were several feet apart, and the lot ran back a good distance."

And a careful re-examination of the testimony has not induced the slightest change in the conclusion then reached. Had this sale been attacked solely upon the ground that it was a sale in gross, it should not have been set aside. This was the ruling in *Benkendorf vs. Vincenz*, 52 Mo., 441.

But in the present case, injurious results attended a sale *en masse*, the interests of the debtor were evidently sacrificed, and sacrificed needlessly, and this was sufficient to warrant equitable interposition.

Judgment affirmed. Judges Vories and Napton concur. Judges Wagner and Adams absent.



CATHERINE COONEY, Defendant in Error, *vs.* LINDSAY MURDOCK, Plaintiff in Error.

1. *Practice, civil—Pleadings—Striking out—Discretion in, etc.*—Trial courts have great latitude of discretion in allowing or refusing permission to file pleadings out of time; and unless that discretion be abused or unsoundly exercised, no case is made for the interference of this court.
2. *Practice, civil—Demurrer—Answer—When filing proper.*—Permission to file an answer during vacation was granted and a demurrer was filed instead. Afterwards the demurrer was, on motion, stricken out and defendant immediately offered to file his answer. *Held*, that if the answer had disclosed a meritorious defense, and no particular delay or hardship would have resulted, such action of the court would be error.

Error to Bollinger Circuit Court.

Robinson & Barret, for Plaintiff in Error.

I. After the demurrer was overruled, the court should have allowed the answer to be filed. The court could adopt no rule or practice in contravention of law.

John Hallum, for Defendant in Error.

I. The action of the court in refusing to permit an answer to be filed after the demurrer was overruled, was within its discretion; a discretion which this court will not undertake to control, particularly as the paper called an answer is not incorporated in the record and made a part thereof by bill of exceptions.

SHERWOOD, Judge, delivered the opinion of the court.

This was a suit in the nature of a bill in equity, brought in the Bollinger Circuit Court. The petition charges fraud in obtaining a judgment before a justice of the peace, in taking a pretended appeal from such judgment, and in having a judgment rendered in the cause in the Circuit Court, and in issuing an execution on such judgment, and having land sold thereunder; and prays for a special and general relief.

The defendant obtained leave to file an answer in vacation; but instead of doing this, he filed a demurrer, which on motion of the plaintiff was stricken out, on the ground, as appears from the bill of exceptions, that it is the well settled rule of practice of that court, not to permit a party defendant to file any pleading in vacation differing in character from that for which leave was granted. To this action of the court exceptions were duly taken, and defendant immediately tendered his answer and offered to file the same, which the court refused to permit him to do, and entered up judgment for the plaintiff, and to this the defendant also excepted, and after unsuccessful motions for a new trial, and in arrest, this cause is brought here on writ of error.

The trial courts undoubtedly have great latitude of discretion as to allowing or refusing permission to file pleadings out of time; and, unless that discretion be abused or unsoundly exercised, no case is made for the interference of this court.

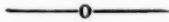
Courts should, so far as is not inconsistent with the proper progress of the business before them, encourage and foster the trial of causes on their merits. But as the answer offered to be filed was not preserved in the bill of exceptions, it is im-

possible to tell anything about it. Nothing may have been alleged therein, which ought to have precluded plaintiff from the relief sought, and in the absence of any evidence in the records to the contrary, we are bound to presume that this was the case.

The action of the court, in striking out the demurrer, under its rules, would seem to have been correct. If, however, the answer had been preserved and had disclosed a meritorious defense, we should have held it an abusive exercise of discretion to have refused permission to file it, as it was already prepared, and no particular delay or hardship would have been occasioned by permitting it to be filed in term instead of vacation.

As to the matters urged in the motions for a new trial and in arrest, they have been already sufficiently discussed in the foregoing remarks.

Let the judgment be affirmed. The other judges concur.



THOMAS CURTIS, Appellant, *vs.* MARY CURTIS, Respondent.

1. *Objection—Grounds of, not specified or mentioned in motion for new trial.—Effect of omission.*—Where the grounds of objection are not specified, and the attention of the court is not called to them, in motion for new trial, they will not be regarded by the Supreme Court.
2. *Practice, civil—Motion pendente lite—Notice of, etc.*—A court may in its discretion, hear a motion for support and maintenance *pendente lite* after a continuance of the cause, and without notice, and on the day of filing the motion.

Appeal from Scotland Circuit Court.

Cramer & Peters, for Appellant.

Birch & McKay, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

This was a suit for divorce instituted in the Circuit Court of Scotland County. At the August term 1872, and on the last day of the term, after the cause had been continued, the

defendant filed her motion for support and maintenance *pendente lite*, of herself and two children until the next term of the court. On the same day, the court, against the objections of the plaintiff, heard and granted the motion, and made an allowance in favor of defendant and against the plaintiff for the sum of \$ 80; and plaintiff excepted and filed his motion to set aside the order of allowance, on the ground that it was irregular in this:

1st. "That said judgment was rendered without proper notice to this plaintiff."

2nd. "That said judgment was rendered before the time allowed by the statute for hearing and determining of motions."

This motion was overruled and plaintiff again excepted, and brings this case here by appeal.

It is not pretended that the allowance made by the court in behalf of the wife and her two children, was excessive; and the allowance upon its face appears very reasonable. Such allowances must be governed by the particular circumstances of each case. As the grounds of plaintiff's objections to the hearing of the motion were not specified, and the attention of the court was not called to them in the motion for a new trial, they were properly disregarded. (*Saxton vs. Allen*, 49 Mo., 417; *Margrave vs. Ansmuss*, 51 Mo., 561.)

No notice of the filing of the motion by defendant was necessary. Notwithstanding the cause had been continued, yet the parties, so far as concerned the consideration of mere minor and collateral matters, were presumed to be still in court. (*Papin vs. Buckingham*, 33 Mo., 454.)

As to the ground that defendant's motion was prematurely heard, it is enough to observe, that the statutory provision that "Motions in a cause filed in term shall be filed at least one day before they may be argued or determined," cannot in the very nature of things be of universal application. So many unforeseen contingencies may arise, during the pendency of a cause, which will necessitate the taking up of motions on the day they are filed, that some latitude of discretion in this particular must be conceded to the trial courts; and it is not thought

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that the statute designs to furnish in this regard anything more than a general rule which must yield when the necessity of the case is so great as to demand it.

For these reasons, with the concurrence of the other judges the judgment will be affirmed.

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SAMUEL S. WATSON, *et al.*, Respondents, *vs.* ALEXANDER GARVIN *et al.*, Appellants.

PER CURIAM.

1. *Presbyterian church—General Assembly—Decree against signers of "Declaration and Testimony"—Effect of—Property rights—Exscinded congregation carries with it property conveyed in trust for its use.*—The decree rendered by the General Assembly of the Presbyterian church against the signers of the "Declaration and Testimony" which declared them to be incapable of sitting in any church judicatory higher than a session, did not excommunicate them as church members, or depose them from their ministerial office nor in any manner treat them as individual members of the church or congregation; and where property had been conveyed to be held for the use of a congregation, that is, for the members of the church composing the congregation, and such church had been cut off by such decree, the property was cut off with them. They could only cease to be members by voluntarily withdrawing or by excommunication, and this decree did not accomplish either their withdrawal or excommunication; and under such conveyance, there was no such implied condition of adherence to the general organism as should work a forfeiture or transfer of property to a new congregation when such adherence is dissolved, not by the direct action of the local body, but by that of the superior judicatory, and without any of the forms of judicial inquiry or trial.

Per ADAMS, Judge; NAPTON, SHERWOOD and VORIES, J. J., concurring; WAGNER, J., dissenting.

1. *Presbyterian church (Old School)—General Assembly—Deliverance on subject of slavery and loyalty—Competency of—Declaration and Testimony, signers of—Decree against, invalid—Property rights, not affected by.*—Under § 4 of the constitution of the Presbyterian church (Old School) which provides, that "Synods and councils are to handle or conclude nothing but that which is ecclesiastical; and are not to intermeddle with civil affairs which concern the commonwealth, unless by way of humble petition in cases extraordinary; or by way of advice for satisfaction of conscience, if they be thereunto required by the civil magistrate," the General Assembly of that church was

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prohibited from making deliverances on the subject of slavery and loyalty and the obligations of the church in that regard, and such deliverances were therefore nullities as far as property rights are concerned; and the decree rendered by the General Assembly, declaring that the signers of a paper called the "Declaration and Testimony," inveighing against such "deliverances," "should not be allowed to sit in any church judicatory, higher than a session, and that if they or any of them should be enrolled as entitled to a seat in any Presbytery, such Presbytery, should, *ipso facto* be dissolved, and the members adhering to the General Assembly were thereby authorized and directed to take charge of the Presbyterial records—to retain the name, and exercise all the authority and functions of the original Presbytery until the next meeting of the General Assembly," was also, as far as property rights were affected, a nullity.

2. *Ecclesiastical and civil courts—Relative jurisdiction—Property rights.*—Civil courts do not interfere with the decrees of ecclesiastical courts when no property rights are involved, because the civil courts have no jurisdiction in such matters and cannot take cognizance of them at all, whether they have been adjudicated by those tribunals or not. But when property rights are concerned the ecclesiastical courts have no power whatever to pass on them so as to bind the civil courts. If a member of the church feels himself aggrieved in his rights of property by the action of an ecclesiastical tribunal, he may resort to the civil courts, and they will not consider themselves precluded by the judgment of this tribunal.

Appeal from Sixth District Court.

The following is the original opinion of the court rendered upon the first hearing of the case by Judge Bliss.

No briefs of counsel as presented on the first hearing, except such as were also presented on the re-hearing, have been furnished to the reporter.

BLISS, Judge, delivered the opinion of the court.

This controversy is between the members of two local church organizations, each styling itself the first Presbyterian church of St. Charles, and grows out of the action of the general assembly (O. S.) of the Presbyterian church, dissolving the Presbytery of St. Louis, and which was under review in *The State ex rel. Watson vs. Farris*, 45 Mo., 183. The action is for the recovery of the church building, parsonage and grounds.

The church was organized in 1818. The lot upon which the buildings are situate was obtained of the town of St.

Charles in 1833, and in 1857 the title was confirmed by the school directors of the city, in whom it had become vested. The ordinance under which the first deed was executed directed that the property be conveyed in fee simple to the elders and deacons of the Presbyterian church of St. Charles and their successors, with the special condition that it shall never be used for any other than religious purposes appertaining to the Presbyterian church of the town, &c.; and by the second deed the school directors, acting under an act of the legislature, released to Watson and others, their heirs and assigns, the same lot, in trust for the congregation of the First Presbyterian church of St. Charles, to be used and occupied for religious worship, &c., with a condition of reversion if used for secular purposes. The legal title to the property comes through the last deed, and as its conditions do not contravene the equities which might be claimed to have accrued from the occupation and improvement of the property under authority of the town, we need only look to that deed for the conditions upon which the property is held. And I may here premise that there is nothing in the terms of the deed creating the trust that shows that the congregation is or requires that it shall remain connected with or subject to any particular ecclesiastical jurisdiction, and if such requirement is found, it must arise from the fact that from its first organization it has been under the care of a presbytery which was subject to the jurisdiction of, first, the General Assembly of the Presbyterian church before its division in 1837, and afterwards of the Old School Assembly.

It is unnecessary to refer in detail to the unhappy controversy that has resulted in the rival organizations that claim the property involved in this suit. The leading facts are stated in the State *ex rel.* Watson vs. Farris, *supra*, and it is now sufficient to say that the defendants compose the majority of the congregation, and adhere to the presbytery of St. Louis, sought to be dissolved by the *ipso facto* ordinance of the General Assembly, and the plaintiffs, composing the minority, and desiring to retain their connection with the Gen-

eral Assembly through that presbytery of St. Louis which is still in fellowship with it, seceded, organized anew, and is recognized by the presbytery last named as the First Presbyterian church of St. Charles. Hence we have two local organizations of the same name, one, constituted by defendants, in possession of the property, and claiming a right to its continued possession from the fact that it is the original organization for whose use the property was conveyed, and has violated no condition of the grant, or in any manner forfeited its right to the continued use, and the other constituted by the plaintiffs, seeking the possession upon the ground that there is an implied condition that the church shall continue in the ecclesiastical connection held when the grant was made; that on the part of the defendants such connection has been dissolved, and that the plaintiffs compose the only organization entitled to the use of the property, according to such condition.

The plaintiffs seem to suppose that the question controlling the rights of the parties to this suit was decided by us in the State *ex rel.* Watson vs. Farris, but they mistake the scope of that decision. The action of the General Assembly there considered was purely ecclesiastical, and the power in controversy depended upon ecclesiastical action merely. As the highest legislative and judicial power in a centralized church, it had but exercised its ancient prerogative in making and unmaking presbyteries. They were its constituent bodies. The expediency or even the right to exercise such a power over them was an ecclesiastical question which the Assembly was competent to decide. Vacancies in the board of trustees of Lindenwood college were, by the terms of its charter, to be filled by a presbytery in connection with the General Assembly. To fill such vacancies by any other presbytery would be a violation of the charter. This provision was a designation of the body that should possess the power of appointing trustees, and indicated the relations of the body to which the founders of the charity would entrust its administration. The confidence and trust was rather in

the General Assembly than in the local presbytery, and we were bound to assume that they acted in view of such a customary exercise of its power. Especially is this so when we see that the supervision of the Old School Assembly, instead of the New was provided for, the significance of which will appear when we consider that the schism creating the Old and New School bodies, arose out of an assumption by one party, and a denial by the other of the power of cutting off and dissolving synods and presbyteries by simple edict, without citation and trial. It is unnecessary to say what would have been our view in regard to the action of the General Assembly complained of, had its effect been to deprive the members of the St. Louis presbytery of property held for their personal use, as of a fund provided for their support. It might, perhaps, have been necessary to look behind the *ipso facto* ordinance to see whether it was regular and the deprivation lawful.

Nor do I understand, as seems also to be assumed, that the action of the General Assembly referred to, either deposed or excommunicated the clergymen composing the St. Louis Presbytery, or that it attempted to dissolve or in any manner affect the local churches in connection with it. An attempt was made to dissolve the presbytery, and its connection with the assembly was actually sundered, but the ministers remained ministers, and the churches remained intact. The clerical character of the former, and the organization of the latter are as complete as before the action of the assembly. Hence, when the defendants are spoken of as being out of the church, as having left the church, etc., nothing more is meant than that the presbytery, under whose care they have always been, is no longer in connection with the General Assembly. I have not learned that the Assembly ever attempts to depose a minister, except upon trial or appeal, or to deal directly with judicatories lower than presbyteries. They, and not the churches or ministers, are its constituents.

In the case before referred to (State, &c. vs. Farris), we considered the extent to which we will go in passing upon

the regularity of the action of ecclesiastical bodies, and held that in ecclesiastical matters we will treat such action as conclusive as to the ecclesiastical relations of subordinate bodies. The old presbytery of St. Louis, after the resolution of the General Assembly referred to, became an independent ecclesiastical body, and though continuing a presbytery in fact, is outside the national organization under the jurisdiction of such Assembly. While the adherence of defendants to this presbytery cannot be treated as a voluntary withdrawal from their connection with the General Assembly, for they did not withdraw in fact, yet they had the power to repudiate the action of their presbytery and place themselves under the care of one recognized by the Assembly. As good Presbyterians, they perhaps, should have done so; but not choosing to make the change, we are compelled to inquire into the effect of their action upon their property rights.

It is not pretended that the property in dispute is held under any express condition of subordination by the *cestui que trust* to any church judiciary. So far as the conveyance is concerned, no one would know to which of the numerous branches of the Presbyterian church this congregation belonged, or whether the name was not used with reference to its internal organization, rather than its subordination. So then, if we find the condition at all, it must arise from the fact that, from the beginning, it was in constant subordination to some presbytery which was a constituent of the General Assembly.

The authorities bearing upon the right of local congregations to control the property held by them or for their use, are so numerous and sometimes apparently conflicting, that in order to know what principles may be considered as settled, I deem it necessary to consider a few of them more at length than is ordinarily admissible.

The case of *The Commonwealth vs. Green*, 4 Wharton, 531, can only be treated as authority in regard to the power of the General Assembly of the Presbyterian church over its synods and presbyteries. The power, the exercise of which

gave rise to that controversy, was disputed by a large portion of the most distinguished members of that church; a new Assembly was organized, including the excised Presbyterians, claiming legitimate succession, but the old Assembly constantly adhered to the claim of power sustained by that case. This court as we have seen has recognized the doctrine of that case, and the recent return of the New School body to the old organization must be regarded as yielding all opposition within the church to this disputed power.

Soon after *Commonwealth vs. Green*, the case of *Presbyterian Congregation vs. Johnston*, 1 Watts and Serg., 9-57 came before the same court, in which the rights of local congregations were more particularly considered. In 1785, the proprietaries of Pennsylvania conveyed to trustees for the use of the religious society of English Presbyterians in York, a lot as a site for a house of worship and cemetery. Before receiving the deed the church had been organized and was under the care, first of the Donegal Presbytery, and afterwards of the Presbytery of Carlisle, which latter body became one of the constituents in the subsequent organization of the general assembly. The church continued under the Carlisle presbytery until the great schism in 1837, when, upon the adherence of said presbytery to the Old School, the congregation severed its connection with it. A minority withdrew, organized regularly, submitted to the presbytery, and sought to eject the majority from the church property, but the court held that there was no implied condition in the original grant under which the majority would forfeit their interest in the trust by the course pursued. In giving the opinion, Judge Gibson distinguishes it from the case where a majority of a church might seek to carry it over to a distinct denomination, intimating that in such case there might be a breach of an implied condition in the compact of association, but as the New School body was as really Presbyterian as the old, there was only a change of connection as regards different branches of the same denomination.

In *Sutton vs. Trustees, &c.*, 42 Pa. St., 503, a congregation

of the Dutch Reformed church called a minister of another denomination, who was examined by the classes and rejected. The congregation then by a majority vote resolved to separate the church from the general body, which the court held they could not do.

The courts of New Jersey have often had the general subject before them, and have held that local church organizations not congregational in principle, are subject to the law of the general organization. The case of *Den vs. Bolton*, 7 Halst., 206, so often cited, was an action of ejectment. The title to property held for the use of a Dutch Reformed church of Bergen county, was vested in the ministers, elders and deacons for the time being, as trustees. A party had seceded from the general body, and the ministers, elders and deacons of this particular church renounced their dependence upon their old classes and synod, and united with the seceding party. The classes from which they had separated cited them to appear and answer charges. They refusing to do so, the case was heard, they were all deposed, and a new election ordered, which was held by that portion of the church adhering to the whole organization. The court held that the proceedings against the old officers, and the election of the new ones were regular, that the latter became the legal trustees and were entitled to possession. *Den vs. Pilling*, 4 Zab., 653, was also an action of ejectment. The American Primitive society (Methodist) of Patterson was subject to the general conference, but the majority seceded from it and refused to obey its orders. The conference ordered a new election of trustees, who were chosen by the adhering minority and brought suit for possession. The cause went against them, upon the ground of irregularity in the removal of the old trustees and election of the new ones, but the court held that the society was subject to the general conference, notwithstanding the subjection was not stipulated in writing, that their connection with the ecclesiastical body having rule over them could be inferred from facts connected with their organization and continued relations. In these two cases, the only question before the court, and really decided

was one of title. The property was held by certain officers of the local body, and by the usages of the denomination, such officers could be removed by the superior judicatory, and a new election provided for. The regularity of such removal and election controlled the question of title.

Hendricks vs. Leecow, 1 Saxton (N. J. Chy.), 577, involved the right of the orthodox and Hicksite Friends to the control of a certain school. The school was established by the Chesterfield Preparation meeting, and the trustees were to be chosen by such meeting. In the Society of Friends there is a strict subordination by the preparative to the monthly, by the monthly to the quarterly, and by the quarterly to the yearly meeting. The Hicksite members of the yearly meeting of Philadelphia, dissatisfied with the proceedings of the meeting of 1827, called a new one for 1828, to be held one week before the regular time. It resulted in a division of all the quarterly, monthly and many of the preparative meetings, especially the one at Chesterfield, each party claiming to be genuine. The court sustained the orthodox yearly meeting and the meetings in subordination to it, as in the regular succession both in organization and in doctrine, and have held that the orthodox preparation meeting of Chesterfield, although a minority, had the sole right to choose the trustees.

The chancellor (Walworth) in *Gable vs. Miller*, 10 Paige, 649, decreed possession of church property in favor of trustees elected by a minority of a German church in New York city, who adhered to the Dutch Reformed classes and synod, against the trustees of the majority, who had employed ministers in fellowship with the German Lutheran church. He reviews at length the history of this organization, shows the distinctions in the theology of the Lutheran and Calvinistic churches of Germany and Holland, and finds that the property was held in trust for worship by a church and ministry in connection with the Dutch Reformed church, and for doctrines recognized by its standards. Upon appeal, the court of errors, (2 Denio, 568) reversed the decree, principally upon the construction of the trust, and held the church to be independent,

and held that the majority might decide within the limits of evangelicism, upon its ecclesiastical connection, or whether it had any. The declaration of trust ran to I. M. Kern, pastor of the Calvinistic church of New York, and recited in substance, that certain German and Swiss inhabitants of New York have by contributions purchased a lot, and with the assistance of charitable and well disposed persons, are erecting a church thereon for the worship of God, concluding that "whereas all parties are inclined to preserve said estate for the pious uses aforesaid, now therefore, &c." Upon this language, Gardener, president of the court, says: "Upon the subject of the church government or connection, the declaration of the trust is entirely silent. We are not called upon to give a construction to an equivocal or ambiguous phrase, but to add by a resort to extrinsic testimony a new condition to the trust, unless indeed we are prepared to determine judicially that men cannot worship God in a house erected for that purpose without the supervision of a bishop or a synod," (p. 544). It may be difficult to find the exact principle that guided the action of a majority of the court, inasmuch as some of its members held that no condition of dependence could be implied from the actual relations of the church; that to be obligatory, it must be expressed in the deed. And others based the reversal upon the ground that this particular church had not uniformly been connected with the Dutch Reformed judicatories, but had at times maintained an independent position.

The case of *Robertson vs. Bullions*, 9 Barb., 64, was heard before the Supreme Court, and the trustees of the religious corporation were prohibited from employing a minister who had been deposed by the superior church judicatory. The trustees acquiesced, but the decree not going far enough to suit the petitioners, they took the case to the court of appeals, and it is reported in 11 New York, 243. The court affirmed the judgment so far as appealed from, and in two very clear opinions show that the judgment against the trustees would have been reversed had they also appealed. The judges based their opinion upon the fact that no conditions were ex-

pressed in the grant, and that the trustees were a corporation which by statute had complete control over the temporalities, though admitting that a voluntary religious association might subject itself to any lawful conditions and obligations. In New York, religious corporations have no denominational character, and their support may be transferred from churches of one denomination to those of another. The property held is limited by an express trust. (*Petty vs. Troker*, 21 N. Y., 267; *Burrill vs. Associate Reformed Church*, 44 Barb., 282; which conflict with the doctrine of *People vs. Steele*, 2 Barb., 397.)

The case of *Smith vs. Nelson*, 18 Vt., 517, was a chancery proceeding to compel executors to pay over a trust fund. It appeared that the general synod of the Associate Presbyterian church had dissolved the presbytery of Vermont, and remanded its members to another presbytery, which deposed certain ministers. The dissolved presbytery, with other ministers sympathizing with it, formed a new synod, and recognized the deposed ministers. The Associate congregation of Ryegate had been under the care of the Vermont presbytery, and the majority retained a minister that had been thus deposed, while the minority, seceding, sustained the action of the synod, and claimed to be the true Associate Congregation of Ryegate. Before these difficulties, one Nelson had bequeathed a sum of money, "as a donation to the associate congregation of Ryegate, to be placed under the direction of the trustees of said society, and the interest thereof to be paid to their minister forever." The executor had paid the legacy to trustees of the minority, who refused to pay the interest to the deposed minister, retained by the majority; but Chief Justice Williams, in an elaborate opinion, held that he was entitled to it, and that the only inquiry to be made was whether the society had a minister chosen by the majority, and regularly ordained over them. He reviewed the ecclesiastical proceedings that had caused the schism, pronounced them irregular, and held that the local society was not bound by them.

In *Ferrarea vs. Vasoncelleo*, 23 Ill., 456, and 27 Ill., 237, a

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church had been organized in connection with the presbytery of Glasgow, Scotland, which connection was dissolved and the church having been for a time connected with the Illinois presbytery, was received into the fellowship of the Sangamon presbytery (O. S). Afterwards the church withdrew from this presbytery, and the adhering minority brought suit against the trustees of the majority, claiming that, by virtue of such withdrawal, and their own adherence, they constituted the church, and asked for possession of the property. The court held that, unless there was some usage or provision in the constitution of the Presbyterian church authorizing a local organization to secede, it had no right to do so, and that by the secession of this church, its right to the use of the church property was lost, and that such use vested in the adhering members. It did not appear that any particular ecclesiastical connection was required, either in the deeds of the property, or otherwise; and it does not appear that the church had been practically independent in its choice of such connections. The case goes farther in subjecting the local organization to ecclesiastical control than any other I have seen, and certainly farther than the Kentucky cases cited in its support.

There are many other interesting cases where the rights of local congregations are involved, among which are *Trustees &c. vs. Seaford*, 1 Dev. Eq., 453; *McGinnis vs. Watson*, 41 Penn. St., 9, and *Gibson vs. Armstrong*, 7 B. Monroe, 481. But they differ so much in their controlling facts from the one at bar, that they throw but little light upon it. Those here-in specially referred to, are where the property was held like that belonging to the St. Charles congregation, and I have made no allusion whatever to cases where the organization was based upon congregational principles.

In all the cases we find it, first, everywhere taken for granted, and must necessarily be so under our system, that upon matters purely ecclesiastical not affecting property rights, the decisions of the proper church judicatories are conclusive upon civil tribunals. They will neither inquire into their fairness, nor question their accuracy.

It is, secondly, also generally conceded, and it may be considered as settled, that in those religious denominations where the local organization is a constituent part of a general body, and dependent upon and under the control of a higher judicatory of that body, and, such relation is specified in and made a condition of a grant of property, the condition is binding, and a local church that by a majority vote would abandon such judicatory cannot take the property with them, but it must be held for the use of those who conform to the conditions of the grant. Such express trusts will be enforced whether there is a corporation holding the temporalities, or whether the property is held by trustees.

But, thirdly, in regard to the right of the local church to hold the church property under a change in ecclesiastical relations, where no condition of subjection to or connection with any particular general organism is expressed in the grant or others wise, but where such church is in fact and by its constitution a constituent part of a general body, and is dependent upon and under the control of the higher judicatory of that body, the decisions as we have seen, are not uniform. In many of the opinions it is held that in such cases it ought to be presumed that the funds were invested upon the implied condition of its continued adherence to such relation, and that a like consequence should follow a voluntary secession as if the condition were express. Other opinions, however, hold that the local organization, whether a corporation or otherwise, may use the property for the general purposes for which it is held, without being fastened to any particular denomination or branch of a denomination.

The case at bar comes under the last class of cases. The congregation of the First Presbyterian church of St. Charles is entitled to the use of this property, as we have seen, upon no express condition in relation to its ecclesiastical connection, although in fact it has never had but one such connection. But it does not become necessary for us to decide which of the views above indicated is correct, whether there is an implied condition of adherence to such connection or not, from the

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fact that congregation has not voluntarily seceded. The whole argument of counsel is based upon the assumption of that fact and their conclusions fail, if that fact be not established. If this local body had not been connected with the excised presbytery, but after the excision, had, by a majority vote, withdrawn from a presbytery still holding the old connection, and united with the one excised, the question would have been raised, and we should be compelled to consider whether there had been a violation of an implied condition. But as it is, there was no withdrawal. The church was in effect itself cut off. It cannot be disputed that the presbyteries, are the constituents of the assembly, while the local congregations or their representative officers are the constituents of the presbyteries; that they have no direct connection with the assembly and cannot be directly reached by it, and that cutting off a presbytery also cuts off its congregation. Here we are relieved from inquiring into the effect of a voluntary abandonment, by a local body, of its ecclesiastical relations.

We have seen that in the Presbyterian church the general assembly may cut off or dissolve presbyteries. But I have never known a case in any civil court, where it has been held that a resolution of a high ecclesiastical judicatory cutting off a lower one, whether by direct expulsion or conditional dissolution like the *ipso facto* ordinance, operates as a confiscation of the property of the local congregation held for their own use with no special trust, in case they do not withdraw from such excised body, or that it operates as a transfer of such property to new organizations created under authority of the excising power. It may be for the peace and good order of the church that such a power be lodged in the general representative body,—of that we can know nothing—but to suppose that it carries with it the power to thus change the titles to all the property of the local congregations would give it a scope and effect hitherto undreamed of. Without citation or hearing, without even the form of judicial investigation, the general assembly, assuming upon common fame the existence of certain local irregularities, as in 1837, or, desiring to punish the authors and

adherents of a libellous and schismatical document, as in 1866 prompted perhaps by intelligent zeal or perhaps by heated blood, expels by name large subordinate judicatories, or condemns in advance the action of certain clergymen and presbyteries; summons them by resolution to appear in the first instance before the appellate body; suspends them in the mean time and dissolves any presbytery that shall admit them to a seat. This would seem to be thorough medicine, though perhaps necessary to meet the disease. It has always been a disputed point between the adherents of different ecclesiastical systems as to how much authority, or whether any at all, should be given to a central power. Upon ecclesiastical matters each must decide for itself. But no man or association of men can be deprived of property except by the law of the land. It is true that trusts pertaining to property held for ecclesiastical uses will be protected like other trusts and their proper administration enforced; but every presumption is in favor of the right of the local congregation to the continued use of property purchased and improved with its funds and held for its benefit, and that right will only be forfeited as a penalty for violating the conditions of the trust. That violation must be positive, affirmative action and cannot be predicated upon a position into which the congregation is thrown against its will, and by a summary exercise of power without judicial investigation. Whatever our opinion of the alleged libellous and schismatical character of the document which was the source of the troubles we find no action based upon it that can affect property. No person or presbytery, if such a thing may be, has been found guilty. No minister has been deposed according to the laws of the denomination, and when the St. Louis presbytery was dissolved, its members were not annexed to any other. The effect of the dissolution was to cut them off from ecclesiastical connection with the assembly, but still to leave them regularly ordained, undeposed Presbyterian ministers competent to perform and actually engaged in the performance of every pastoral duty. It is not for us to explain the precise ecclesiastical position of such undeposed ministers, but

only to say that local congregations by continuing them in the relation they had long sustained, which they were qualified to fill by their ordination and installation, and from which they had never been severed according to the laws of the church, either by deposition or by removal, cannot be found guilty of such a violation of the implied conditions upon which they hold their property as to work its forfeiture, or authorize its transfer to other organizations.

There have been many schisms in Presbyterian and other churches similarly organized, that have arisen from the exercise of extraordinary powers by the central body, but local church properties have, so far as I know, remained undisturbed. The excising ordinance of 1837, or as Judge Gibson called it in *Commonwealth vs. Green*, the ordinance of dissolution, cut off four among the heaviest synods of the church, each containing many presbyteries, and provided for the organization within their bounds of new churches and presbyteries in sympathy with the majority in the assembly. Among the multitude of churches thus cut off, holding the most valuable church properties in central and western New York and northern Ohio, I have not learned that a single attempt was made to transfer such property to the adherents of the general assembly. Some attempts were made outside the limits of the excised synods against those churches that, from sympathy with these synods, left the presbyteries that adhered to the assembly, but as in *Commonwealth, &c. vs. Johnston, supra*, they uniformly failed.

It may be claimed that under this view the property of the local church may be wholly diverted from the purpose of its original grant; that when the presbytery itself becomes diseased, there is no other remedy but to cut it off. I may not say what other remedies are provided, but I can imagine that in a church that has played such an important part in the history of constitutional liberty in Europe some mode less summary is known, and usually followed, and that factious and disorganizing men could be reached by methods analogous to trials and judgment in civil tribunals, and to motions or disfranchisement in corporations.

Under this view of the rights of local congregations or churches to property held for their own use, without condition expressed, we cannot find any such implied condition of adherence to the general organism as shall work its forfeiture or transfer to a new congregation when such adherence is dissolved, not by the direct action of the local body, but by that of the superior judicatory, and without any of the forms of judicial inquiry or trial.

The judgments below are therefore reversed. The other judges concur.

A re-hearing of the case was granted, and upon the re-hearing the following briefs of counsel were presented and the following opinion rendered by the court :

Glover & Shepley, and Lackland, Martin & Lackland,
for Appellants.

I. The case turns upon the construction of the deeds by which the property in dispute was conveyed in trust for the "First Presbyterian Church, of the town of St. Charles." The deeds vest the property in the congregation of the First Presbyterian Church. The church being composed of members, equity fixes the use of the property in them, and unless the members sued in this case have lost their equitable right by force of some condition in the deeds, or unless they have ceased to be members of the said church and therefore no longer beneficiaries under the deed, the decree which was made by the court below is wrong.

II. There is no condition in the deeds which affects the question.

III. There is nothing to show that the plaintiffs in error, have ceased to be members of the First Presbyterian Church. It appears that in 1866 the General Assembly of the Presbyterian Church of the United States condemned as slanderous and schismatical, a paper issued by certain of her ministers and elders known as the "Declaration and Testimony," and that by a decree of the said General Assembly certain presbyterian synods, presbyteries, ministers and elders were arbitrarily expelled or cut off from the General

Assembly. But in the utmost scope of this decree it fell short of reaching any person as a church member. It neither purported to unpresbyterianize any one, or to make any person then a member no member of any church. It pronounced no judgment on any member of the First Presbyterian Church of St. Charles. It put no member out of the church, it made no one of them a Methodist, a Baptist or a Catholic.

IV. The proceedings of the twenty-two members of the St. Charles Church were void so far as related to the title of the church property. They could determine their religious or social relations towards the forty-nine and no court could force different relations upon them ; but it was not competent for them by their own act to settle the rights of property between them and their brethern. When a question of property arises between church parties, the arbitrary opinion of one of the parties is not the rule of right. If a church has its articles of faith and discipline, the members enter the church in reference to these articles, and their property rights as members are based upon the articles and cannot be taken away by any proceeding in violation of such articles. Now what is the rule of decision in such a case ? Is an arbitrary act of a church in such case binding on property rights ? Are twenty-two members out of seventy-one the church ? If the forty-nine had expelled the twenty-two in the same way, would that be binding ? This class of legislation originated in England, and in the earlier cases the courts refused to interfere. But they found it was impossible to stand upon that ground. The doctrine was then laid down that in questions touching property rights of church parties, that party should hold the property that had acted in conformity to church laws. (*Craigdallie vs. Aikman*, 1 Dow. R., 1 ; *McGinnis vs. Watson*, 41 Pa. St., 1.)

V. The title to church property in case of a divided congregation is with that party which is acting in harmony with the church laws. (*Smith vs. Nelson* 18 Ver., 511 ; *Smith vs. Swormstedt*, 5 McLean, 388.) The deeds leave this property as that of the St. Charles Church, independent of any connection. (*Miller vs. Gable*, 2 Denio, 492 ; *People vs.*

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Steele, 2 Barb., 397; Presbyterian Cong'n vs. Johnston, 1 Watts & Searg, 1; Watson vs. Avery, 2 Bush., [Ky.] 333; State vs. Farris, 45 Mo., 198.) In controversies as to the title to property the edicts of ecclesiastical bodies are not conclusive. (Roberston vs. Bullions, 9 Barb., 134; Natal vs. Gladstone, 3 Law. R. Eq., 1; June Law of Creeds, p. 266; Kniskern vs. Lutheran Church, 1 Sandf. Ch., 439.) The proceedings of the twenty-two were void, because they could not obtain the property of the forty-nine by a violation of church laws. (45 Mo., 183.)

VI. The deed does not require any connection with the General Assembly, the property is conveyed to the First Presbyterian Church of St. Charles; no doctrines are named, no discipline, no form of church government, and there is no implication of such a requirement from the fact that it was once in connection with it. *Expressio unius exclusio alterius*; whatever the parties did not put into their contract they did not intend.

VII. The case of Watson vs. Jones, (13 Wall., 679,) is no authority in this. Not being in construction of federal laws it has no power to conclude this court. This court ought to conform its rulings to its past opinion on all the questions involved. This court held in 45 Mo., 198, that though in ecclesiastical questions the church rulings are conclusive, the rule is different when property is involved. The federal courts have no jurisdiction to reverse this ruling, and if they have done so, this court is not bound. But they have not done so. The facts upon which the Supreme Court ruled that case, admitted there, are denied here.

Orrick & Emmons, for Respondents.

I. Civil courts cannot look beyond the decrees of ecclesiastical judicatories and overhau their decisions. (State *ex rel.* Watson vs. Farris, 45 Mo., 183, and cases referred to. The defendants are no longer members of the First Presbyterian Church of St. Charles, and therefore have no right to the use of the temporalities granted for the use of the congregation. (Den vs. Pilling, 4 Zabr., 653; McGinnis vs. Watson, 41

Penn. St., 1; Robertson vs. Bullions, 9 Barb., 134; German Reformed Church vs. Seibert, 3 Barr., 282; Commonwealth vs. Green, 4 Wharton, 531, 599; Gibson vs. Armstrong, 7 B. Mon., 481; Shannon vs. Frost, 3 B. Mon., 258, 261; Harmon vs. Dreher, 1 Speers Eq., 87, 91; Watson vs. Avery, 2 Bush., 332, 398; Den vs. Bolton, 7 Halst. 206; Harper vs. Straws, 14 B. Mon., 56; Sutter vs. Dutch Ref. Ch., 6 Wright, 503; Sheldon vs. Easton, 24 Pick., 281; Diefendorf vs. Ref. Ch., 20 Johns, 12; Lawyer vs. Cipperly, 7 Paige, 281; Miller vs. Gable, 2 Denio, 492; Gable vs. Miller, 10 Paige, 627; Hadden vs. Chorn, 8 B. Mon., 70.)

II. The action of the General Assembly, synod, presbytery and session, whereby the plaintiffs were recognized as the congregation of the First Presbyterian Church of St. Charles, did not attempt, and did not in fact affect in any manner the title to the property;—the legal title still remains in the trustees,—the use in the congregation. The church courts declare that a certain body of christians constitute the congregation of the Presbyterian Church of St. Charles; that they are in harmony with the church as to doctrine, and submit to its government. This is purely an ecclesiastical matter, proper to be decided by an ecclesiastical court and improper for any other. The true theory is, and the one adopted by this court in the case of Watson vs. Farris, (45 Mo., 183,) that the civil courts will accept as conclusive the decisions of ecclesiastical tribunals upon questions purely spiritual, and where civil rights depend upon an ecclesiastical matter, will take the ecclesiastical decisions out of which the civil right arises as it finds them. (See also Harmon vs. Dreher, 1 Speers S. C., Eq., 87, 121; Shannon vs. Frost, 3 B. Monroe, 261; Robertson vs. Bullions, 9 Barb., 134; German R. Ch. vs. Seibert, 3 Barr., 282.) Here we do not propose to disturb or affect in the least, the legal title, that is in the trustees mentioned in the deeds. We ask to be protected in the use as the congregation designated in the deeds, and invoke the aid of the church in the enjoyment of an ecclesiastical right, our rights as a congregation ecclesiastically having been determined by the church courts.

III. The temporalities in question were granted and dedicated to the use of the congregation of the First Presbyterian Church of St. Charles, in connection with the General Assembly of the United States of America, old school, of which the plaintiffs and defendants were members. The defendants are no longer members of said congregation, and the said plaintiffs are the true successors of the congregation of said church, to which said property was originally granted and dedicated, and are entitled to the exclusive religious use thereof. (Shannon vs. Frost, 3 B. Monroe, 253; Miller vs. Gable, 2 Denio, 492; Gibson vs. Armstrong, 7 B. Mon., 481; Diefendorf vs. Ref'd Church, 20 Johns. R., 12; Harmon vs. Dreher, 2 Speers, 87; Den vs. Bolton, 7 Halstead, 206; Ger. Ref. Ch. vs. Seibert, 5 Barr., 291; Watson vs. Farris, 45 Mo., 183.) This last named case settles the question that where a civil right depends upon an ecclesiastical right, the latter must be determined by the ecclesiastical judicatories. It also explains how far and to what extent these judicatories may effect by their decree "property rights." It may be proper to revert to the fact, that in this proceeding the plaintiffs are not insisting upon any change in the title of the property involved. The judgment of the court below simply gives to the plaintiffs the exclusive use of the church property, the legal title remaining in the trustees where it was before this suit was instituted. We insist that the members of the congregation, as such, have no property interest in the real estate; they as members come and go; when one leaves the congregation it is not necessary that he should make any conveyance of his property interest. He takes nothing with him and leaves nothing behind him. His right to worship as a member of the congregation is an ecclesiastical right which the Supreme Court says, is subject to be controlled by the ecclesiastical judicatories. Where a civil right depends upon an ecclesiastical right, civil courts will not enter upon an inquiry as to the authority of the ecclesiastical judicatories to take the action they may have taken. This rule we understand the court to have violated in rendering the

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decision in this cause, when it questioned the authority of the General Assembly to dissolve synods and presbyteries, &c. The action taken in this regard was the same in the Kentucky case, and the Supreme Court emphatically held that as a civil court here in the United States, where the absolute separation of church and State is one of the corner stones of our free institutions, it will not pass upon such questions.

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in equity, brought by the plaintiffs in the St. Charles Circuit Court, claiming to be the only beneficiaries of certain church property, consisting of a house of worship and a parsonage in the city of St. Charles. They allege that they alone constitute the congregation of the First Presbyterian church of St. Charles, and that the defendants, who at one time formed a part of the congregation, had voluntarily withdrawn from the church, but still held the property, to the exclusion of the plaintiffs. The defendants deny all the allegations of the petition, and charge the facts to be that they and the plaintiffs together constituted the congregation entitled as beneficiaries to the use of the church, up to the time of the dissensions growing out of the action of the General Assembly in its deliverances on the subject of slavery and "*loyalty*." They deny that they have prevented the plaintiffs from the occupancy of the church jointly with themselves, and charge that the plaintiffs have voluntarily withdrawn and formed an independent congregation. They deny that this independent organization, as such, are beneficiaries entitled to the property in dispute.

The leading facts are, that in the year 1818, a Presbyterian congregation was formed in the town of St. Charles, called and known as the First Presbyterian church of St. Charles. This organization, according to the Confession of Faith and Form of Government of the Presbyterian Church, consisted of persons who had been baptized into the Church and had united together for religious worship. The judicatory of this church was a pastor and two ruling elders, called the session.

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Under the constitution of the Presbyterian Church, this congregation, with others, united together and formed a presbytery, called the St. Louis Presbytery, and this presbytery and others formed a Synod, and these presbyteries sent their commissioners to the General Assembly. And so in this way the First Presbyterian Church of St. Charles was a part of, and subject to the control of the General Assembly. This General Assembly divided into two General Assemblies in 1837, known as Old School and New School, and the church of St. Charles became united to the Old School.

The deeds under which the property in dispute is held, conveyed it to trustees, "in trust for the congregation of the First Presbyterian Church of St. Charles." There were two deeds; one made in 1833, and the other in 1857, confirming the title conveyed by the first deed. There is nothing in either deed which requires that the congregation should be under the control of any superior judicatory. The facts, however, show that this congregation continued in connection with the St. Louis Presbytery and the General Assembly (Old School) until it was exscedind in the manner hereinafter set forth.

From the commencement of the late war of rebellion, and during its prevalence, the General Assembly (Old School) at its annual meetings made deliverances on the subject of slavery and loyalty, declaring the obligations of the church in this regard. A large minority of the church, in different States considered these deliverances of the General Assembly unconstitutional; that is to say, that the church, as a church, according to its written Confession of Faith and Form of Government, had no authority to make deliverances on purely political and civil matters. This minority protested against these deliverances, and issued a paper called the "Declaration and Testimony," inveighing against the conduct of the majority. This paper gave great offense to the majority, and they took steps for punishing the offenders, which resulted in an *ex parte* decree rendered by the General Assembly, without the form of trial, declaring in effect that the

accused ministers should not be allowed to sit in any church judicatory higher than the session, and that if they, or any of them, should be enrolled as entitled to a seat by any presbytery, such presbytery should, *ipso facto*, be dissolved, and the members adhering to the General Assembly were thereby authorized and directed to take charge of the presbyterial records, to retain the name, and exercise all the authority and functions of the original presbytery until the next meeting of the General Assembly.

Twenty-two members of the congregation of the First Presbyterian church of St. Charles, being the plaintiffs in this suit, formed a new congregation, with a minister and ruling elders, and betook themselves to another place of worship, leaving the remainder of the congregation, consisting of forty-nine members, a minister and ruling elders, in possession of the church and parsonage. This action was taken by the minority because the majority had expressed their adherence to the doctrines of the paper known as "The Declaration and Testimony." Both of these congregations sent their respective representatives to the St. Louis Presbytery, which had been formed on the plan directed by the General Assembly by excluding the "Declaration and Testimony members." This presbytery received the delegates sent by the plaintiffs and excluded those sent by the defendants, and made a decree to the effect that the plaintiffs were the real and only congregation composing the First Presbyterian Church of St. Charles, and that the congregation made up of the defendants was not the First Presbyterian Church of St. Charles, or any part of it.

The Circuit Court decreed the property to the use of the plaintiff, excluding the defendants from the same. The defendants appealed to the Sixth District Court, which affirmed the judgment of the Circuit Court, and from this judgment of affirmance the defendants appealed to this court. At the March Term, 1871, this court, then consisting of three judges, reversed the judgments of the District and Circuit Courts, Judge Bliss delivering the opinion of the court. A motion was made for a re-hearing, and this motion was sus-

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tained, and the case was set for a re-hearing and continued on the docket for that purpose till the March Term, 1873, when it was re-argued and submitted to the court, and has been under advisement till the present time.

It is proper to state that the court, under a new constitutional amendment, has been re-organized, with two additional judges; and that, as now organized, it consists of five judges, only one of whom was on the bench when the first opinion was delivered. Although we concur in the result arrived at by the court in its former opinion, the importance of the principles involved demands that the court, as now organized, should briefly present the grounds of its assent, and the points passed on by us.

1. At the threshold of this inquiry, we are met with the startling proposition that, in cases like this, the judgment or decrees of ecclesiastical judicatories are final and conclusive, and that the civil courts have no authority in the premises, except to register these decrees and carry them into execution. It is to be regretted that loose expressions, by elementary writers, and also by judges in delivering their opinions, have given too much foundation for this false doctrine. Even the Supreme Court of the United States, in *Watson vs. Jones*, 13 Wallace, 679, gives prominence to this idea by making it the chief foundation of their opinion. That court seemed to think the judges not sufficiently learned in ecclesiastical law to pass on such questions, and that the ecclesiastical courts, being better qualified than themselves, ought to be allowed to be the exclusive judges.

The civil courts are presumed to know all the law touching property rights; and if questions of ecclesiastical law, connected with property rights, come before them, they are compelled to decide them. They have no power to abdicate their own jurisdiction and transfer it to other tribunals. If they are not sufficiently advised concerning the questions that arise, it is their duty to make themselves acquainted with them, in all their bearings, and not to blindly register the decrees of tribunals having no jurisdiction whatever over property.

The true ground why civil courts do not interfere with the decrees of ecclesiastical courts, where no property rights are involved, is not because such decrees are final and conclusive, but because they have no jurisdiction whatever in such matters, and cannot take cognizance of them at all, whether they have been adjudicated or not by those tribunals. This principle forms the foundation of religious liberty in Republican governments. The civil authorities have no power to pass or enforce laws abridging the freedom of the citizen in this regard, and hence, in matters purely religious or ecclesiastical, the civil courts have no jurisdiction.

A deposed minister or an excommunicated member of a church, cannot appeal to the civil courts for redress. They can look alone to their own judicatories for relief, and must abide the judgment of their highest courts as final and conclusive. But when property rights are concerned, the ecclesiastical courts have no power whatever to pass on them so as to bind the civil courts. If they expel a member from his church, and he feels himself aggrieved in his rights of property by the expulsion, he may resort to the civil courts, and they will not consider themselves precluded by the judgment of expulsion, but will examine into the case to see if it has been regularly made upon due notice, and if they find it to be duly made, they will let it stand, otherwise they will disregard it, and give the proper relief. In most cases, no doubt, the judgment will be found to be sufficiently regular to fix the *status* of the expelled member and to warrant the civil courts in denying the desired relief.

2. This controversy had its origin in the deliverance of the General Assembly regarding slavery and loyalty. If this venerable body had no authority in their ecclesiastical capacity, to make the deliverances in question, the subsequent acts of the church judicatories growing out of them, must be treated as nullities, at least as far as property rights are concerned.

It must be conceded on all hands, that questions of slavery and loyalty are merely political and civil, and not ecclesiastical or religious in their nature; and yet it is true as a matter

of fact, that during the late war between the States, the highest judicatories of most of the churches, both North and South of the federal lines, bent before the storm of passion that swept over the country and engaged in the strife by entering upon their records deliverances in aid of their respective civil authorities.

Had these judicatories any power in their ecclesiastical capacities to do this is the question raised by this record for us to decide. The Presbyterian Church has always been considered, and no doubt is, one of the orthodox Protestant churches, and as such forming a part of the spiritual kingdom of Christ upon earth. Christ authoritatively declared that His kingdom was not of this world. His disciples, as such, owe allegiance alone to Him as the great Head of the Church: As citizens of a republic or subjects of a monarchy or empire, their civil allegiance was due to their respective governments. But the kingdom of Christ is wholly independent of civil governments. This spiritual kingdom has existed and continued to flourish for almost nineteen centuries. While civil governments of all kinds have arisen and lived for a season and then crumbled and faded away, the kingdom of Christ has stood amidst the throes of revolutions; and in the sure hope and faith of its subjects, it will stand till the end of time, and spread throughout all the regions of the earth, until every knee shall bow in humble submission to His holy will. As the Presbyterian Church is a part of this spiritual kingdom, it had no right as such to interfere in civil matters. But the Presbyterian Church also has a written constitution which their ecclesiastical judicatories have no authority to violate. They are as much bound by the provisions of this constitution as the supreme law of the church, as the State and Federal governments are by their respective constitutions.

The written constitution of the Presbyterian Church contains this section: "IV. Synods and councils are to handle or conclude nothing, but that which is ecclesiastical; and are not to intermeddle with civil affairs which concern the commonwealth, unless by way of humble petition in cases extraordi-

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nary; or by way of advice for satisfaction of conscience, if they be thereunto required by the civil magistrate." (See Confession of Faith, chap. 31, sec. 4, pp. 159-60.)

In explanation of this section, which is found word for word in the Confession of Faith of the Westminster Assembly of divines, the Rev. Robert Shaw, whose work is considered as a standard authority, says:

"While our Confession denounces any Erastian interference in matters purely spiritual and ecclesiastical, it no less explicitly disavows all popish claims, on the part of the synods and councils of the church, to intermeddle with civil affairs unless by way of petition in extraordinary cases, or by way of advice when required by the civil magistrate. Our reformers appear to have clearly perceived the proper limits of the civil and ecclesiastical jurisdiction, and to have been very careful that they should be strictly observed. 'The power and policy ecclesiastical,' say they, 'is different and distinct in its own nature from that power and policy which is called civil power, and appertaineth to the civil government of the commonwealth; albeit they be both of God and tend to one end, if they be rightly used, viz: to advance the glory of God and to have godly and good subjects. Diligence should be taken chiefly by the Moderator, that only ecclesiastical things be handled in the Assemblies, and that there be no meddling with anything pertaining to civil jurisdiction.' Church and State may co-operate in the advancement of objects common to both, but each of them must be careful to act within its own sphere, the one never intermeddling with the affairs that properly belong to the province of the other." (See Exposition of the Confession of Faith, p. 337.)

The meaning of the section commented on by Rev. Robert Shaw seems to be sufficiently obvious from its own language, but this authoritative exposition puts at rest any possible doubt as to its true intent. In my judgment it prohibited the General Assembly from making the deliverances under review; and they are therefore nullities so far as property rights are concerned. In pronouncing upon these deliver-

ances, we impute no intentional wrong to that reverend and learned body of divines ; we hold them in the highest esteem, and regard them as incapable of any such thing.

3. But if this act of the General Assembly and the excising decree pronounced against the defendants, be treated as within the scope of ecclesiastical authority, such excision surely ought not to have the legal force of cutting off the property rights of the defendants. The penalty decreed against the offending ministers by the General Assembly did not excommunicate them as church members, nor depose them from their ministerial office. They were declared to be incapable of sitting in any church judicatory higher than the session. But they still held their commissions under which they might "Go into all the world and preach the gospel," receive members into the church, and administer the usual rites to that end, and form congregations of Presbyterians for religious worship.

The excising decree against the defendants, cut them off in a body from the higher judicatories of the church, but did not excommunicate them, nor in any manner touch them as individual members of the church or congregation. They occupy in that respect precisely the same attitude they did when they joined the church and made up the congregation. At the time the excising decree was pronounced they undoubtedly were beneficiaries entitled to the property in dispute. When this congregation was cut off, their property was cut off with them. If they had money in their treasury to pay their minister or other expenses of the church, that money was cut off with them, and still remained their property subject to their disposition ; and in like manner the church edifice and parsonage remain theirs as they were before the excision. If this *ipso facto* self-executing decree had the effect of destroying existing property rights, it could only do so by overriding the plain provisions of the bill of rights of our State and Federal constitutions, which declare in substance that no person can be deprived of his property without due process of law ; and that private property cannot be

taken for public use without a just compensation ; and that means, that private property cannot be taken at all, except for public use and then only on payment of a just compensation. How could the existing property rights of the defendant be transferred from them to the plaintiffs without the form of trial, and without any power in the judicatory to act on such rights? It would seem to be a ridiculous farce to hold that the plaintiffs being a part of the original congregation could separate themselves into a distinct organization and then have themselves declared by an *ex parte* decree the exclusive owners of the property. If that could be done by a part of a congregation, why could it not be done by strangers to the congregation or emissaries from other States erecting themselves into a Presbyterian congregation and then calling themselves by the same name and having themselves pronounced by the Presbytery the only genuine congregation, entitled to the treasure and property of the old congregation. Courts of justice are made to protect parties in the enjoyment of their rights of person and property, and not to destroy them by upholding such contrivances. But the deeds themselves, by which the property in dispute is held, show the rights of these parties. It was to be held for the use of the congregation—that is, for the members of the church composing the congregation. They can only cease to be members by voluntarily withdrawing, or by excommunication. They have not withdrawn, nor have they been excommunicated. They are still Presbyterians of the same faith and forming a part of the original congregation ; and as such are entitled as beneficiaries under those deeds to their interest in the property.

I have not considered it necessary to cite adjudged cases in support of the points here discussed. On questions growing out of church dissensions, the authorities are numerous and contradictory and it would be a useless task to try to reconcile them as each depends so much on its own facts and surroundings. Judge Bliss has referred to the main leading cases in his opinion and I am satisfied with his review of them. But *Watson vs. Jones, supra* had not been deter-

mined at the time Judge Bliss filed his opinion. That case is relied on by the learned counsel for plaintiffs as controlling authority and therefore demands our notice.

In the first place this case originated in Kentucky, and was pending in the courts of that State under the name of *Fulton vs. Farley*, which had been decided by the Court of Appeals under the name of *Watson vs. Avery*, 2 Bush., 332. The Louisville Chancery Court had possession of the property in dispute, and it was in the hands of a receiver of that court. The Court of Appeals of Kentucky, had also decided the case of *Gartin vs. Penick*, 5 Bush., 110, and passed on the principles involved in both of these cases. And yet the Supreme Court of the United States, two judges dissenting and the chief-justice not sitting, did not seem to feel any embarrassment in assuming jurisdiction of the case pending in the State Courts and to overrule, two well considered opinions of the Kentucky Court of Appeals. (*Watson vs. Avery*, 2 Bush., 332, and *Gartin vs. Penick*, 5 Bush., 110.) I have always understood the law to be that when two courts have concurrent jurisdiction, the one which first assumes jurisdiction has the sole right to decide the whole controversy. Any other rule would lead to insuperable difficulties and conflicts. If the Court of Chancery at Louisville, had possession of the case, as it undoubtedly had, how could the Circuit Court of the United States take jurisdiction of the same case, simply because some of the beneficiaries lived in another State? The residence of the parties is sufficient to give the Federal courts jurisdiction where nothing intervenes to prevent it. But can a Federal court oust the jurisdiction of a State Court which has already attached? Can jurisdiction be taken by halves or parts? Must it not go to the whole controversy in courts of chancery, before it can attach at all? How can a decree rendered in a Federal court in this sort of case nullify the decree of the State Court? It can only be done by blotting out what little remains of the vestiges of State rights.

But if the Federal Supreme Court had any jurisdiction, it was certainly not superior to the Court of Appeals. In the

light of the law, as I understand it, the Kentucky Court of Appeals was the only court of the last resort in those cases. Where the jurisdiction of the Federal Courts grows out of the residence of the parties, they act as auxiliary to or in aid of the State Courts. Therefore, the Federal Supreme Court in *Watson vs. Jones*, cannot be regarded in the light of a court of last resort. In fact it was its duty under the law to be controlled by the principles which had been decided by the Court of Appeals, and to register its decrees instead of those of the ecclesiastical tribunals. If we allow the decrees of ecclesiastical tribunals to affect property rights, surely such courts in the State of Kentucky are inferior to the Court of Appeals, which is the only court of last resort in that State and has the right to pass ultimately upon the judgments of all the inferior tribunals. "No good lawyer can entertain any doubt that the church courts are to be regarded as subordinate in all respects and wholly dependent upon the rules of law established by the decisions of the highest State tribunals. The extent of the jurisdiction of all inferior courts must be dependent upon the final decision of the Courts of Appeals. Any other rule must lead inevitably to intricate confusion." As the Court of Appeals in Kentucky is the only court of last resort in this class of cases, its opinions ought to be regarded as better authority than those of the Federal Supreme Court. Besides, in point of talents and ability, the Kentucky Court of Appeals deservedly stands high, and its opinions in the cases referred to are supported by a weight of reasoning which the Federal Supreme Court did not seem able to overturn.

For these reasons I do not consider the case of *Watson vs. Jones* sufficient authority to control the action of this court.

Judgments reversed and petition dismissed. The other judges concur, except Judge Wagner, who dissents. Judge Napton was not present at the argument, but concurs in this opinion.

WAGNER, Judge, dissenting.

I am unable to distinguish this case from *Watson vs. Farris*,

(45 Mo., 183) and *Watson vs. Jones*, (13 Wall., 679), and believing as I do that those cases assert correct expositions of the law, I am therefore constrained to dissent from the opinion above announced.

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JACOB CANTLING, Respondent, *vs.* HAN. & ST. JOE. RAILROAD COMPANY, Appellant.

1. *Railroad Companies—Responsibility of, for dog left with baggage master.*—The owner having a dog on a railroad train, being informed by a brakeman and the baggage master that the animal was not allowed in the passenger car placed him in charge of the baggage master, and paid the latter for his transportation. By the regulations which were posted and printed at the various stations "live animals" were "allowed as baggage men's perquisites." No special notice of this rule was brought home to the owner. Company held liable for loss of the dog by the baggageman.
2. *Evidence—Experts, opinions of, as to market value of dogs.*—Experts may be allowed to give their opinions as to the marketable value of dogs, the opinions being based either on actual sales or their general observation and experience.

Appeal from Macon Circuit Court.

James Carr, for Appellant.

I. A dog is not baggage. Respondent had no legal right to have the dog in controversy carried; and if the appellant had refused to carry the dog it would not have been guilty of a breach of duty. (*Bell vs. Drew*, 4 E. D. Smith, 59; *Hawkins vs. Hoffman*, 6 Hill, 585; *Cin. & Ch. R. R. Co., vs. Marcus*, 38 Ill., 219; *Pardee vs. Drew*, 25 Wend., 459; *Collins vs. Boston & M. R. R. Co.*, 10 Cush., 506; *Orange Co. Bank vs. Brown*, 9 Wend., 86; *Harris vs. Han. & St. J. R. R. Co.*, 37 Mo., 307.)

II. Carrying a dog may be regarded more in the light of carrying live animals than baggage. The appellant is not liable for the loss of live stock unless guilty of negligence. (*Carr vs. Lancashire & York R'way*, 7 Exch., 712; *McManus vs. Lancashire R'way Co.*, 2 Hurl. & N., 693; *Palmer vs. Grand Junction R'way Co.*, 4 Mees. & W., 758; *Clark vs.*

Rochester & S. R'way Co., 14 N. Y., 573; Mich. South. & N. Ind. R'way Co., vs. McDonough, 21 Mich., 165; Smith vs. New Haven & Northampton R. R. Co., 12 Allen, 531; North Eastern R'way Co. vs. Richardson & Cisson, 26 L. T., [N. S.] 131; Boyce vs. Anderson, 2 Pet., 150.)

III. The appellant was not acting in its capacity of common carrier in carrying the respondent's dog; the most favorable aspect in which the case can be viewed for the respondent is, that the appellant, was a private carrier for hire; and as such, it is only liable in case of negligence. (Ang. Car., §§ 46, 54; Story Bailm., § 495; Satterlee vs. Groat, 1 Wend., 273; Wells vs. Steam Nav. Co., 2 N. Y., 204; Caton vs. Rumney, 13 Wend., 389; Runyan vs. Caldwell, 7 Humph. 134; Alexander vs. Greene, 3 Hill, 9; Brind vs. Dale, 8 Car. & Payne, 207.)

Williams & Ederman, for Respondent, cited in argument, Brill vs. Flagler, 23 Wend., 355; 5 Seld., 188; 28 Mo., 127; 2 Redf. R'way [4 Ed.], 91-9.)

NAPTON, Judge, delivered the opinion of the court.

This action originated before a justice of the peace, to recover the value of a dog, alleged to be worth ninety dollars. It is averred that the dog was delivered to the baggage master of a train on which plaintiff was a passenger; and that the baggage master agreed to transport the dog to New Cambria, for \$1.50 which was paid, and to deliver him at New Cambria to said plaintiff. The dog was lost and plaintiff therefore sued the R. R. Co., defendant.

The plaintiff recovered before the justice, had a verdict and judgment for \$90, from which defendant appealed to the Circuit Court.

The facts as they appeared on the trial were about these: The plaintiff, on his return from a hunting excursion, took passage on the defendant's road at St. Joseph, and took the dog with him into the coach. About an hour after the train started, he was told by a brakeman that dogs were not allowed to ride in the passenger coaches, and that the dog must be

put in the baggage car, and subsequently the plaintiff received the same information from the baggage master; whereupon the baggage master took the dog in the baggage car, and the plaintiff, after inquiring about the charge, paid the baggage master \$1.50 for the transportation of the dog to New Cambria.

The principal witness for plaintiff proposed to state the value of the dog, but this was objected to on the grounds that dogs had no marketable price, and that the dog in question was not shown to possess any peculiar qualities which would make him vendible; but this objection was overruled and the witness said the dog was worth \$100, after previously stating that the dog was a well trained setter and particularly valuable as a water dog. The same witness was asked what he gave for the dog, and this question was objected to as immaterial and the objection sustained.

Several witnesses were examined as to the value of hunting dogs and testified about their price varying from 50 to 75 dollars, admitting however that this depended very much on the fancy of the purchaser.

It seems, that certain rules on the subject of baggage had been at the time of this occurrence adopted by defendant, and posted up in printed form at the various R. R. stations. The only important part of these regulations is the following, "Live animals are allowed as baggagemen's perquisites." The general baggage agent of defendant stated in his deposition that "it is the custom of R. R. Co. to allow baggagemen to receive and transport dogs on their own personal account and personal responsibility to their owners. None of the companies receive any part of the compensation or assume any of the responsibility for the care or delivery of such dogs."

There was no evidence that the plaintiff knew of any such regulations, except from their being posted up as above stated.

The dog in question was not injured or lost, in the course of transportation, but the baggage master delivered the dog to some person, not the plaintiff, and at some way station, not New Cambria, and so the plaintiff lost him.

The court declared the law to be, that a dog is not baggage, and that defendant, as a common carrier, was not bound to receive and carry a dog in a passenger coach or in a baggage car attached thereto, although the owner was a passenger and that the measures of damages in the event of a finding for the plaintiff, was the actual market value of the dog in the vicinity of New Cambria and not any fanciful price of the owner.

The court also refused two instructions which are as follows: 1st. The defendant may make a rule permitting its baggage master to take a dog owned by a passenger upon one of its passenger trains into the baggage car of said train, for the accommodation of such passengers, and to receive the perquisites for feeding and watering and taking care of such dog for such passenger, and in the event that such dog should never be delivered to such passenger by said baggage master, the defendant would not be liable to him for failing to deliver such dog. 2nd. If the Court believe from the evidence that the plaintiff without the knowledge or consent of the agents or employees conducting and managing the train on which plaintiff took passage, took the dog sued for into one of defendant's passenger coaches at St. Joseph with the intent to have said dog carried from St. Joseph to New Cambria; that after said train left St. Joseph an hour or more he was informed by employees of defendant on said train, that said dog could not be allowed to be carried on said coach, that he thereupon put said dog into the baggage car attached to said train in charge of the baggage master thereof, and said dog was never delivered to plaintiff by said baggage master, the court will find for defendant, although it may further believe from the evidence that the plaintiff, put said dog in charge of the baggage master of said train at the instance of said baggage master, and paid said baggage master for feeding, watering and taking care of said dog for him.

The case was submitted to the court and the court found for the plaintiff, and assessed his damages at \$30.

The main question is whether the plaintiff was entitled to

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recover of the R. R. Co., for the value of a dog lost by the baggage master, to whom the dog was entrusted, and who was authorized by the regulations to take the dog in the baggage car as "perquisite," there being no special notice to the owner, except such as may be implied from such regulations being printed and posted in the station offices. It is conceded that the baggage master had a right, under the regulations of the company to receive a dog of a passenger and charge a small sum for his trouble, but it is claimed that by the printed regulations, as well as by the custom of this and other Railroad Companies, no responsibility is assumed by the Companies; that all losses whether accidental or willful or negligent, must be borne by the traveler, whose only remedy is a suit against the baggage master. In other words the traveler must bear the loss, if any occurs, for it would be folly to talk of a suit against a baggage master.

In the case of *Minter vs. Pac. R. R.*, (41 Mo., 503,) this court held, that an agent of a railroad company, in that case a baggage master, acting within the general scope of his employment, bound the company, notwithstanding in the particular case he disregarded instructions. That was a case where an article of freight was received by the baggage master as baggage, contrary to the rules of the company. In this case the baggage master acted in conformity to his instructions, and received the dog in his baggage room and took his perquisites, as the company allowed him to do. But the company insist that they are not responsible, because although allowing their servant to receive and charge for such property, they notified the public that no responsibility on their part was assumed, and that it was an affair of the baggage master, their employee.

There is no question of negligence or diligence in this case, for the fact is proved and not disputed that the baggage master delivered the dog to some one, other than the traveler, at a station to which the traveler was not bound. It is not therefore, a question, whether the R. R. Co. was bound as a common carrier, against all losses except those arising

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from the acts of God or the enemies of the country, nor whether the company was bound to ordinary diligence, but whether the company is bound at all and under any circumstances. We think as the company undertook through its agent to transport the dog, and deliver him at a place designated and to the plaintiff, they should be held responsible for a delivery at a different place and to another person.

It may be questioned if the printed notice that "live animals are baggagemen's perquisites," necessarily leads to the conclusion that no responsibility whatever is assumed in such cases by the company. It certainly implies that the company allow these baggage masters to take "live animals" in the baggage room, and that the charge for doing so is a perquisite of the baggage master and does not go into the coffers of the company, but it does not necessarily imply that no responsibility whatever was assumed by the company. And if it did, can the company by such printed notices, exempt themselves from a responsibility for ordinary care and diligence in the transportation and delivery of the article? In other words, can the company take charge of the property and promise to deliver it and assume no liability whatever?

Judicial opinions both in England and this country are not altogether harmonious as to the limitations which common carriers may make, by special contracts or general notices on their common law liabilities; but I do not understand that any of the cases have gone so far as to determine that Railroad Companies can exempt themselves from that responsibility which every bailee assumes for ordinary care and common honesty. If their employees are allowed to receive goods or live animals at all for transportation, the public have a right to infer that without an accident they will be delivered to the person and at the place directed, and that ordinary care and diligence will be used for this end. It is a mere mockery to turn the owner over to a subordinate, about whose responsibility no one can know except the company that employs him.

The instructions therefore which assume the irresponsibility of the defendant, without regard to the execution of the

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implied contract by the baggage master, under any circumstances, were properly refused.

The evidence concerning the value of the dog in question, by the owner, and the opinions of other witnesses on the value of dogs generally, having the qualities attributed to this particular dog, was rightly admitted. Such is the usual mode of ascertaining the price of cattle or sheep or any other marketable commodity, and is necessarily more or less a matter of opinion among the dealers in such stock or property. Of course, actual sales may be more reliable evidence of the market price, but experts may be allowed to give their opinions based either on actual sales at the time and place, or on their general observation and experience, and was so held by Judge Nelson in the case of *Brill vs. Flagler*, 23 Wend., 355, and by the Court of Appeals in *Clark vs. Bond*, 9 N. Y., 188.

Judgment affirmed. The other judges concur.

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STATE OF MISSOURI, *ex rel.*, JAMES T. DOBBINS, and three hundred other citizens of Reynolds Co., Mo., Defendants in Error, *vs.* ALLEN SUTTERFIELD, *et al.*, Justices of Reynolds County Court, Plaintiffs in Error.

1. *Judgment, final—What is—Mandamus from Circuit to County Court.*—The judgment of a Circuit Court against the justices of the County Court, granting a writ of mandamus on them to appoint commissioners to select a site for a county seat, is a final judgment from which appeal will lie, notwithstanding the fact, that a proceeding is at the time pending in the County Court in regard to the establishment of a county seat. The judgment is a finality as to the Circuit Court. (*McVey vs. McVey*, 51 Mo., 406; *Thomas vs. Drennan*, 41 Mo., 289.) This proposition is not in conflict with *Tetherow vs. Grundy Co.*, 9 Mo., 118.
2. *Elections—Removal of county seat—"Two-thirds" vote—Construction of Constitution.*—The State Constitution, Art. IV, § 5, prohibits the removal of a county seat unless "two-thirds of the qualified voters shall vote in favor of such removal," and the same instrument provides for the registering of voters. The statute relating to the same subject, (*Wagn. Stat.*, 405, § 22) requires a two-thirds vote of the "legally registered voters," to warrant the transfer. *Held*,

that two-thirds of the votes cast at an election on the question of removal, would be insufficient, under the law, to authorize the change, unless they numbered two-thirds of all the qualified voters of the county.

3. *Stare decisis—Rule, when binding.*—This court will hesitate to interfere with previous adjudications, where on the faith of such decisions, property has been acquired or money invested.

Error to Reynolds Circuit Court.

J. L. Detchemendy, on motion to dismiss.

I. The motion to dismiss ought not to be sustained, because there is a final judgment of the Circuit Court of Reynolds County, Missouri, from which the plaintiffs in error have appealed. The cases of Dunklin County vs. District Court, 23 Mo., 449, and the State vs. Lafayette County Court, 41 Mo., 221, and other cases decided by this court have no application, for the plaintiffs in error in the case at bar, are not asking for the remedy by a writ of mandamus, but for a review of an erroneous judgment of an inferior court, by the mode known to the law, and of which this court has full and complete jurisdiction. The statutes do not make any discrimination or difference between a writ of mandamus to remove county seats and any other cause or party or parties whatever, as to the right of appeal. (State vs. Bollinger Co. Court, 48 Mo., 475, and cases there cited.)

II. A county seat cannot be removed, "unless it appears, affirmatively, that," two thirds of all the legally registered voters of the county, at a general election, have "actually" voted in favor of such removal. (Const. Mo., Art. 4, § 30; Wagn. Stat., 405, § 22; State vs. Clark Co. Ct., 41 Mo., 44; Cocke vs. Gooch, Sup. Ct., Tenn. [April Term], 1871.)

Chase & Howell, and Finkelnburg & Rassieur, for Defendants in Error, on motion to dismiss.

I. The action of the court below ordering the appointment of commissioners, was not a final judgment or decision upon which a writ of error will lie. It was an incidental and collateral judgment or order, while the principal proceeding was in progress and remained unfinished. The main proceeding

was the statutory one for removal of seats of justice, and the order appointing commissioners, so far from being the last is one of the first steps in this proceeding. (*Tetherow vs. Grundy Co. Court*, 9 Mo., 118; *State vs. Clark Co.*, 41 Mo., 44; *George vs. Craig*, 6 Mo., 648.) The statute provides (§ 29) that the commissioners shall report to the Circuit Court, whereupon the Circuit Court may approve such report, and if it is likewise approved by the County Court, then it becomes a finality and not before. If an appeal would lie at all upon such a proceeding, it would only lie in case of a final judgment. (*Wood vs. Phelps Co. Court*, 28 Mo., 119.)

II. But the law does not contemplate any appeal or writ of error in such cases at all. (*Wood vs. Phelps Co. Court*, 28 Mo., 119; *Tetherow vs. Grundy Co. Court*, 9 Mo., 118.) And plaintiffs in error cannot do, by an indirect proceeding in this case, what the law does not permit them to do directly. The vote was sufficient, although there were not two-thirds of all the votes cast at said election, there being two-thirds of all those who voted on this proposition. All those who did not vote on the proposition of removal are presumed to acquiesce. (*State vs. Binder*, 38 Mo., 450; *State vs. Mayor*, 37 Mo., 270; *Dil. Mun. Corp.*, 65; *Rex vs. Foxcroft*, 2 Burr., 1017.)

NAPRON, Judge, delivered the opinion of the court.

Dobbins and three hundred other citizens of Reynolds county, applied to the Circuit Court of that county for a mandamus on the county justices, to appoint commissioners to select a site whereon to locate the seat of justice.

To the writ, which was issued, the County Court returned that at the general election held on the 5th of Nov., 1872, the proposition to remove the seat of justice of Reynolds county from its present location, did not receive "two-thirds of the legally registered votes of Reynolds county," nor were two-thirds of the legal voters of said county polled at said election as appeared by the returns of said registration and election; that at a registration held for said county within 60 days preceding

the 10th day prior to said Nov. 5, 1872, six hundred and ninety-four (694) voters legally registered in said county; and that the proposition to change the county seat received only 244 votes out of 694 legally registered voters, and out of 547 votes actually polled at the said election.

As a further answer, the court averred, that there had not been raised by a tax, sufficient money from the people to pay for all the lots and improvements sold by the county at Centreville, the present seat of justice, which had been located for twenty-eight years past, and was within five miles of the center of Reynolds county, and that no petition for the removal of said county seat had been presented within ten years after said seat of justice had been located.

This return on demurrer, or rather on a motion to strike it out and disregard it, was held insufficient, and a peremptory mandamus was awarded. To this judgment a writ of error, was taken.

A motion is made in this court to dismiss the writ of error, because there was no final judgment in the case, and to sustain this, various authorities are cited to show that a writ of error only lies on a final judgment, and that this judgment is not final.

But there is no force in this objection. The judgment of the Circuit Court ordering the peremptory mandamus is the end of the case, so far as that court is concerned. Its jurisdiction is certainly exhausted, and the question it decided is gone forever from its control. That a proceeding is collaterally going on, still pending in the County Court in regard to the establishment of the county seat of Reynolds county is a fact, which does not impeach the finality of the judgment of the Circuit Court on the mandamus. What is meant by a final judgment is, that it is final so far as the court which rendered it is concerned, and that court is one to which a writ of error will lie to this court.

It has been frequently held by this court that in proceedings for partition, an appeal would not lie from a judgment *quod partitio fiat*, because it was virtually interlocutory in its

character, and might, upon the coming in of the commissioners appointed to make the partition, be ultimately disregarded. The judgment in that case is not final, as the court in which it is rendered still proceeds with other branches of the same case. But a judgment of peremptory mandamus in a proceeding or application, which in many respects is like any other civil suit, and is attended or may be attended with all the forms of pleading and trial of issue incident to any other action, is a final judgment in that proceeding, and is not the less so because what may be done by the court against which it is issued, in pursuance of the mandamus or otherwise, may still be pending. This point was so ruled in *McVey vs. McVey*, 51 Mo., 406, and in *Strouse vs. Drennan*, 41 Mo., 289, and is not in conflict with the decision referred to of *Tetherow vs. Grundy county*, 9 Mo., 118.

The question remains whether the County Court in deciding on the construction of the statute regulating their action in regard to this matter was wrong; assuming that the rule laid down in *Castello vs. St. Louis county*, 28 Mo., 259, is correct, and that where the inferior court, on a preliminary question arising on a statute, misconstrues it, this court may compel by mandamus the inferior court to proceed with the case.

The constitution of this State (Art. IV, § 30) says: "The General Assembly shall have no power to remove the county seat of any county, unless two-thirds of the qualified voters of the county, at a general election, shall vote in favor of such removal."

The statute on the subject (*Wagn. Stat.*, 405, § 22) says, after providing for an election: "If it shall appear by such election that two-thirds of the legally registered voters of said county are in favor of the removal of the county seat of such county, then the County Court shall appoint five commissioners," etc.

In this case, as it appears from the return of the County Court to the mandamus, the registration immediately prior to the election showed that there were in Reynolds county 694 voters, that 547 of these duly registered voters actually voted

at the election, and only 244 voted for the removal of the county seat. It appears from the statement of the petitioners, which we will assume to be correct, that only 47 votes were cast against the removal. The County Court decided that 244 was not two-thirds of 694, nor of 547, and as the constitution required that two-thirds of the qualified voters should vote for such removal, they refused to appoint commissioners or proceed further in the matter. The Circuit Court held that, as 244 was two-thirds of 291—all the votes cast on the question of removal—the requisite constitutional majority was obtained.

There is no doubt that in general, where an election is held to determine the choice of a candidate or the determination of some question of public policy, the plurality required by the law, whether it be a bare majority or two-thirds or three-fourths, is determined by the result of the vote cast, without regard to the number of voters declining to vote, and this is upon the ground that the failure to vote is assumed or may be presumed to be an acquiescence in whatever result may be produced by the action of those who feel sufficient interest in the election to go to the polls and vote, and for the further reason that in most cases there is no mode by which the number of absentees can be ascertained. The decision of Lord Mansfield in *Rex vs. Foxcroft*, 2 Burr., 1017, is therefore rightly followed in many cases in this country where it might be properly applied. But the decisions in England, or in the other States, are very unsafe guides, where we are called upon to construe a constitutional or statutory provision of our own State. If the language is plain and unambiguous, its requirements cannot be set at naught upon the strength of decisions elsewhere on statutes or constitutions, essentially variant or couched in very different terms:

Our constitution, in regard to the proposed removal of county seats, it seems to me, hardly admits of two constructions. It prohibits the legislature from removing them, unless two-thirds of the qualified voters shall, at a general election, vote for the removal. The words do not imply an ac-

quiescence or a negative sanction, or a negative assent inferred from absence, but a positive vote in the affirmative, and the number of votes required is specifically named, and there is no difficulty in ascertaining what that number is, since the same constitution provides for a registration, and points out who the qualified voters are; and the statute in this case uses the words, "legally registered voters," and requires two-thirds of them to vote for the change; and the return of the County Court produces the registration and shows that not one-half of the registered voters voted for the change, and not one-half of the voters who voted at the election voted for it. With what propriety, then, can it be said, that two-thirds of the qualified voters voted for the change.

We are referred, however, to two decisions of this court, (*Bassett vs. The Mayor, &c.*, 37 Mo., 270, and the *State vs. Binder*, 38 Mo., 450) which are supposed to maintain views conflicting with this opinion. We should hesitate to interfere with previous adjudications of this court, if on the faith of such decisions, property had been acquired or money invested. The views of the court on this subject have already been expressed in the case of *Smith vs. Clark Co.*, *ante* p. 58. But a reference to these cases will show that neither of them arose on the construction of a provision of the constitution or on the subject matter now under consideration. The act of the legislature referred to in the case of *Bassett vs. The Mayor, &c.*, required the question of borrowing money to be submitted to a vote of the qualified voters of St. Joseph, and required two-thirds of such votes to sanction the same. It appeared that there was no registration of voters in the city, and the only guide to determine the number of qualified voters was the result of the last election which preceded the one in question, and according to that there were only 338 voters in the city, and at the election in controversy, 336 votes were in favor of the loan, and only 58 votes against it. In the case of the *State vs. Binder*, an act of the legislature, authorized certain municipalities to permit the sale of liquors on Sunday whenever authorized by a majority of the legal

voters of the municipality to do so. An election was held at which a majority of those voting were for the permission, and this was held to authorize an ordinance allowing such sales. But in the *State vs. Winkelmeier*, 35 Mo., 103, it was held, that where an election was held at which 13,000 votes were cast, a vote of 5,000 on a specific question submitted was not the vote of a majority, though only 2,000 votes were cast against the proposition specifically put. So that we have two decisions one way and one the other, and the last is exactly in conformity with the facts on the record in this case. The return of the county justices shows that not even a majority of the votes cast were for the removal.

In none of these cases, however, was there any examination of, or construction given to the precise language of the constitutional provision now under consideration. The two cases last named were upon temporary acts of legislation, in which a construction either way was not of importance, as a subsequent legislature could readily do away with any inconvenience which might arise from incorrect or unacceptable constructions.

The present case, however, suggests very different considerations. The question of removing county seats was regarded by the framers of our constitution, as of sufficient importance to require very stringent provisions in that instrument, and an examination of the laws in force on this subject, at the time of the adoption of this new constitution, will show the great importance of requiring a strict compliance with its provisions.

It will be observed, that the return in this case shows—and the facts stated in it are admitted—that the county seat of Reynolds county was permanently located in 1845, twenty-eight years ago, and no attempt has been made to remove it to another place till the present movement; that it is located also within four miles of the center of the county—and no tax has been levied to pay for the lots or improvements in the present county seat—for the constitution now forbids it.

At the time this location was made, and from that time till

the new constitution was adopted, the law required three-fifths of the taxable inhabitants, to institute proceedings, and a majority of the inhabitants of the county who paid taxes on lands or were householders, to sanction a removal. It was also provided, (§ 34, R. C., 1855, p. 518-19) that "when a county seat shall have been located within five miles of the center of a county, and shall have continued to be the county seat for the term of ten years, and no petition within that time, made in good faith, and signed by at least a majority of the taxable inhabitants of the county, praying for the removal of the seat of justice, shall have been presented, the same shall not thereafter be removed, unless the County Court will first raise a tax sufficient to pay the appraised value of all lots and the improvements thereon, at such county seat, which the holders thereof may desire to relinquish to the county."

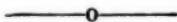
The concluding clause of the section of the constitution which has been heretofore copied, says: "No compensation or indemnity for real estate or the improvements thereon, affected by such removal, shall be allowed."

Thus it will be readily seen that questions of vast importance and presenting some difficulty, may arise in removals of county seats, such as the one in the county of Reynolds. No authority is needed to sustain the proposition that constitutions cannot impair contracts or divest vested rights any more than legislative enactments, and the question will arise whether any vested rights will be disturbed, in case a *bona fide* vote of two-thirds of the people of the county shall favor the contemplated removal, without any attempt at compensation. The question is made and presented by the record in this case—but it has not been investigated nor is it intended to intimate any opinion on the subject—as the decision of the point already examined disposes of the case.

There is no doubt that these municipal corporations, such as counties, are subject to the will of the legislature, and may be altered or abolished at pleasure—and that county seats may be changed, notwithstanding previous laws declaring them perpetual—but a legislature may make contracts as well

as individuals, and if rights of property are vested by an act of the legislature, they cannot be destroyed by subsequent enactments. Whether any such rights would grow out of the laws of 1855 and prior ones, is a question we have not examined. The subject is very fully discussed in *Armstrong vs. The Board of Co. Coms.*, 4 Blackf. Ind., 209. I merely mention it to show the importance of our enforcing a strict observance of the constitutional and legislative requirements, preliminary to a change which necessarily in all cases more or less affects the value of the property at the old county seat, and gives rise to litigation, expensive, tedious, and of uncertain results.

The judgment of the Circuit Court is reversed. The other judges concur.



PIZARRO W. HOWELL, Defendant in Error, vs. ELIAS C. STEWART, Plaintiff in Error

1. *Practice, civil—Pleadings—Notes—Illegality of contract—Misdemeanor—Statute, construction of.*—In a suit on a note an answer, alleging that the money was advanced for an illegal purpose, is bad, if it does not allege that the money was so used; furthermore, when the act is made by statute (Acts of Feb. 26th 1869, and Feb. 2nd 1872,) a misdemeanor, the intent to do the act is wholly immaterial.
2. *Contracts—Sales—Illegal intent—Knowledge of—Recovery.*—Apart from felonies or crimes involving great moral turpitude, the mere knowledge of the lender or vendor, that the money loaned, or property sold, is designed to be applied to an unlawful purpose, will not prevent a legal recovery based on such loan or sale.
3. *Statute, construction of—Offenses—Parties designated as offenders—Liability of others.*—When a statute, defining an offense, designates one class of persons as subject to its penalties, all other persons are to be deemed as exonerated.
4. *Practice, civil—Pleadings—Answer—Demurrer—Motion to strike out.*—When the answer to a suit contains no defense, the plaintiff may demur to it or move to strike it out.
5. *Practice, civil—Pleadings—Amendments—Meritorious defense—Supreme Court.*—The Supreme Court will not interfere with the discretion of lower courts in refusing to allow time to amend an answer, unless the record discloses a meritorious defense, which the court by its action precluded the defendant from availing himself of.

*Error to St. Charles Circuit Court.**Glover & Shepley*, for Plaintiff in Error.

I. If the contract grows immediately out of, or is connected with, an illegal or immoral act, a court of justice will not enforce it (2 Kent Com., 466; Buck vs. Albee, 26 Ver., 184). If the illegal use to be made of the goods or money enters into the contract, and forms the motive or inducement in the mind of the vendor (or lender) to the sale or loan, then he cannot recover, provided the goods or money are so used. (Kneiss vs. Seligman, 8 Barb., 439; McKinnell vs. Robinson, 3 Mee. & W., 434.)

II. That, for which a demurrer will lie, cannot be reached by a motion to strike out.

W. A. Alexander, for Defendant in Error.

I. The mere fact of knowledge on the part of Howell, that Stewart was about to bring the cattle into the county contrary to law, does not invalidate the note.

II. The answer does not say what was done with the money. (Michael vs. Bacon, 49 Mo., 474.)

III. As to amending the answer, there is no statement under oath or otherwise of any good defense.

SHERWOOD, Judge, delivered the opinion of the court.

The plaintiff brought suit against the defendant in the St. Charles Circuit Court on a promissory note, dated July 8th, 1872, for the sum of one thousand dollars.

The answer of the defendant is as follows: "Defendant for his answer says, that he is surety only on the note sued on, that the principal debtor therein is John E. Stewart, that said debt was contracted for money loaned said Jno. E. to assist him in bringing in said county of St. Charles Texas cattle, contrary to the statute law of this State, and at a time when their importation was not allowed, to-wit: between the first days of March and the first days of December; that the said plaintiff loaned said Jno. E. said amount of money with the knowledge that

said Jno. E. was engaged in bringing said cattle into said county, and that at the time said loan was made the said Jno. E. had in the city of St. Louis two hundred head, more or less, of said cattle, which were held by the carriers for freight and charges, and that the same could not be moved until said charges were paid; that said Jno. E. desired to bring said cattle into said St. Charles County, and applied to plaintiff for aid in order that he could pay said charges and procure the necessary help in order to drive said cattle into said St. Charles County; that said plaintiff, with full knowledge and in order to assist said Jno. E. in paying said charges, help, etc., loaned said amount of money to said Jno. E., that the importing and bringing said cattle in said county at said time was illegal and contrary to the act of the General Assembly of said State, approved Feb. 26th, 1869, that said plaintiff loaned said money to said Jno. E., with the full knowledge that he was engaged in bringing said cattle in said county, and for the express purpose and design on his part to aid and abet the said Jno. E. in his designs in and about the importation of said cattle at said time, wherefore, this defendant says that said plaintiff ought not to have or maintain his aforesaid action, etc." On the ground that this answer did "not state facts sufficient to constitute a defense to plaintiff's claim," it was stricken out on motion of plaintiff, and the court thereupon entered interlocutory and final judgment against the defendant, who duly saved his exceptions both to the sustaining of the motion and the rendition of judgment. These proceedings were had on the 8th day of Sept. 1873; *three* days afterwards the defendant filed his motion to set aside the judgment and for leave to file an amended answer, on the grounds, that no opportunity was afforded defendant to amend his answer, as the court rendered judgment immediately on the determination of plaintiff's motion; that defendant was entitled to his day in court, that the cause was not set for trial until the 15th of the month, that defendant, having filed his original answer within the time prescribed by law, was not in default, that defendant according to the rules of the court was entitled to a reasonable time in which,

to amend his answer, and no such opportunity was given, that his defense was meritorious, and the amendment only asked in furtherance of justice.

This motion being overruled, defendant excepted, and filed his motion to set aside the first judgment as well as to set aside the judgment overruling his motion. This motion being also overruled, he again excepted, and brings the case here on writ of error.

The points involved in this record, and to which our attention has been called by counsel, are three, namely:

First—Did the matter contained in the answer constitute a defense to the action?

Second—If the answer did not set forth a defense, could the defect be reached by motion to strike out, or could this result have been accomplished by demurrer alone?

Third—Conceding that the answer was no bar to plaintiff's action, did the court err in rendering judgment without affording the defendant an opportunity for amendment?

These questions will be considered in their order. As to the first: No review *in extenso* of the numerous and, in many respects, conflicting authorities on the topic of the avoidance of contracts in consequence of illegality will be here attempted, but our attention will be directed in that channel of thought, and to that mode of reasoning, which we deem applicable to the point in hand and regard as sustained by well considered cases.

We look upon this answer as essentially bad in *two* particulars: First, it does not aver that the money loaned was ever in fact *used* in consummation of the alleged illegal purpose. Second, even if it had contained such allegation, it would still have been bad, because of the *terms of the statute* on which reliance must have rested to sustain the charge of illegality.

The act of February 2nd, 1872, is substantially like that of February 26th, 1869, in its prohibition of the introduction into any county in this State, at a certain season of the year, of Texas, Mexican or Indian cattle.

The penalty for the infraction of this statute is, so far as con-

cerns the person of the offender, a fine, or both a fine and imprisonment in the county jail. The offense then is but a statutory *misdemeanor*, and in that class of offenses the *intent* is wholly immaterial, as the law in such cases predicates guilt alone on the *act done* irrespective of the motives which prompted its commission. For with mere *guilty intention*, unconnected with overt act or outward manifestation, the law has no concern.

According to the defendant's own showing *no act was done*, and consequently, the law which he seeks to use as a shield not having been violated, it follows as an inevitable sequence, that there was no *illegality* in the transaction to which his answer refers.

There is no room therefore in this case for the application of those maxims ordinarily applicable where guilty purpose is merged and swallowed up by criminal execution.

Aside from felonies or crimes involving great moral turpitude, the mere knowledge of the lender or vendor, that the money loaned, or property sold, is designed to be applied to an unlawful purpose, will not prevent a legal recovery based on such loan or sale. This was so held in *Michael vs. Bacon*, 49 Mo., 474. And that case goes far toward being decisive of this; for cases of that character are not legally distinguishable from this, on the point now under discussion, as in either case there must be something done, beyond a simple sale or loan, in furtherance of some intended illegal act which is actually *consummated*, before he who loans, or he who sells, can become in legal contemplation a participator, upon whom the gates of justice will be shut.

Thus in *Holman vs. Johnson*, Cowp., 341, the leading case, in England on the subject, the plaintiff, a resident of Dunkirk, sold a quantity of tea to the defendant, and delivered it there to the defendant's order, to be paid for in ready money at the place of delivery, or by bill drawn on the plaintiff in England.

The seller *knew* that the defendant intended to smuggle the tea into England, but had no concern in the transaction itself, and Lord Mansfield held the plaintiff entitled to recov-

er, remarking however, that if the plaintiff beside the bare sale and delivery at Dunkirk, had assisted in running the tea into England in contravention of the revenue laws of that country, the result would have been otherwise.

This case was followed in *Biggs vs. Lawrence*, 3 T. R., 454; *Clugas vs. Penaluna*, 4 *Id.*, 466; *Waymell vs. Reed*, 5 *Id.*, 599. But these cases differed from the one just cited, in this, that the plaintiffs respectively in the three cases mentioned in Term Reports, in addition to a sale, had made themselves *participants* in the affair, by so packing the goods that they were readily smuggled into England, and those cases, while expressly upholding and cordially approving that of *Holman vs. Johnson*, *supra*, pointed out the difference I have stated as the reason why the plaintiffs in those actions were denied a recovery.

So also in *Cannan vs. Bryce*, 3 Barn. & Ald., 179, it was held, that money loaned for the accomplishment of an illegal purpose, and applied to such purpose, could not be recovered.

It will thus be readily perceived, that (*with the before mentioned exceptions*) mere knowledge and mere intent stand upon one and the same footing, and an examination of the adjudicated cases, both in England and in this country, shows, that the great current of authority flows in the above indicated direction, and that so long as a design to commit a misdemeanor remains *in fieri*, unclothed with any of the attributes of legal tangibility, it will constitute no basis of defense to an action.

Any other doctrine than this would make courts but the registers of the designs of the unscrupulous, the law itself a by-word and a reproach, and totally pervert its noblest and most beneficent maxims. (*Tracy vs. Talmage*, 14 N. Y., 162, and cases cited; *De Groot vs. Van Duzer*, 17 Wend., 170; *Kniess vs. Seligman*, 8 Barb., 439; *Mount vs. Waite*, 7 Johns., 433; 2 Com. on Cont., 109, and cases cited; *White vs. Franklin Bank*, 22 Pick., 181.)

Briefly then, the true rule in the great majority of cases is this; that many contracts which if *executed* would bear the

taint and consequent disabilities of illegality, are not obnoxious to such objections while remaining *executory*.

Now with regard to the point, that the answer would still have been bad, even had it averred the *actual* application of the money to the alleged illegal purpose, because of the *manner* in which the statute is *drawn*.

It will be observed, that the penalties therein enumerated are directed, *not* towards those who *loan* money for the "express purpose" of bringing Texas, Mexican or Indian [cattle] into any given county in this State, but solely against him, and him alone, who drives, or otherwise conveys, or has under his *control*, any such cattle contrary to the provisions of the first section of the statute. This language thus designates the *person* on whom the penalty is to fall.

As Lord Mansfield, in *Browning vs. Morris*, Cowp., 790; when remarking on 14 Geo., III, Chap. 76, which prohibited the insurance of lottery tickets by lottery office keepers, tersely says: "The statute itself * * * has *marked the criminal*. For the penalties are all on one side; upon the *office keeper*." And the same learned judge cites with approval the decision made by Blackstone, J., in *Jaques vs. Golithly*, 2 W. Bl., 1073, wherein he made the distinction between that statute and the stock jobbing act of 7 Geo. II, Ch. 8, whereby *all participants* were deemed equally criminal, and held that those, whose tickets had been insured, might recover the premiums so paid from the office keepers, as the legislative inhibition fell *only* upon *them*. And the parallel here instituted, between 14 Geo., III, Ch., 76, and the act in question, is not at all affected by the reflection, that but *one* class of persons is mentioned in the act under consideration, and *two* classes in that which prohibited the insurance of lottery tickets by the office keepers. For if a criminal prominence be given to one of two mentioned classes of persons by statute, and the statute which defines the offense, by its designation of the one class as subject to its penalties, is thereby to be deemed as exonerating from punishment the *other*, most assuredly this result would follow as to *all persons not* mentioned, where the

statute, as in the present instance, makes mention of *but one* class of offenders.

It is very clear to my mind, therefore, that, even if the alleged unlawful contract had *found consummation*, it would not have precluded plaintiff of his action. Besides this statute is highly penal, and this affords another and very cogent reason for its strict construction.

Assuming then, as a sequence of the foregoing, that the answer contained no defense to the action, was the motion to strike it out the proper course to pursue, or should resort have been had to a demurrer? Even had this question not been already answered by our statute, it would not be an open one, as it has been decided that a proceeding in such case by motion is as free from objection as that by demurrer. (*Sappington vs. Jeffries*, 15 Mo., 628; *Cashman vs. Anderson*, 26 Mo., 67; *Robinson vs. Lawson*, 26 Mo., 69.)

It only remains to consider the last question propounded in the outset. Did the court err in refusing the defendant an opportunity for amendment?

The case of *Cashman vs. Anderson*, just cited, is decisive also of this point. It does not appear from the bill of exceptions, in *what* the proposed amendment consisted. For aught disclosed by the record to the contrary, it may have been equally valueless as a defense, as the matter set forth in the answer stricken out.

In *Cashman vs. Anderson*, *supra*, the motion was heard on the very day it was filed, and the defendant asked leave to amend his answer, without stating in *what particulars* he desired to amend, but the court refused leave, and the cause being submitted to the court, judgment was rendered for the plaintiff. In that case, immediately upon the motion being sustained, the defendant asked leave to amend, that being denied and judgment rendered against him, he straightway filed his motion to set aside that judgment. Here the defendant contented himself with merely excepting, and did not even ask leave to amend at the time the motion prevailed, nor did he file his motion to set aside the judgment rendered until

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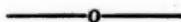
three days after its rendition, nor did he indicate in that motion of what his "*just defense*" consisted.

As is well said in the case last referred to, in which the judgment of the lower court was affirmed, "to say that the right for time to prepare an amended answer is *absolute* will often, especially in courts that are in session but a few days, give the defendant with a bad answer an advantage he could not have with a *good* one."

If this record disclosed a *meritorious defense*, which the court by its action precluded the defendant from availing himself of, no hesitation would be felt in rebuking such action, as an undoubted abuse of that discretion, which the law, in furtherance of justice and not for purposes of caprice, petty tyranny or oppression, has lodged with the trial courts.

But in the *entire absence* of any such disclosure, the presumption, which favors the acts of the court below, must prevail. (Cooney vs. Murdock, *ante* p. 349.)

The judgment is affirmed. Judge Adams absent. The other judges concur.



ANN E. MORTON, Plaintiff in Error, *vs.* WILLIAM H. HATCH,
Defendant in Error.

1. *Administration—Widow—Legatee—Suit by in her own right in sister State.*—An estate was fully administered in Kentucky. Having no debts in Missouri, it was not probated here. The widow who was executrix and also devisee of the estate, after final settlement, brought suit in her own right upon a claim owing the estate by a defendant residing in Missouri. *Held*, that the action would lie in this State.

Error to Hannibal Court of Common Pleas.

John L. Robards & T. H. Bacon, for Plaintiff in Error.

I. The existence in a sister State of a foreign administration, its final settlement and the discharge and release of plaintiff in error as foreign executor, were facts sufficient to authorize her as sole devisee and legatee under the will to institute in

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Missouri an action to recover a debt due to the testator, whereof under his will she was sole and absolute owner. (Sto. Confl. Laws, 888, § 516 n. [3 Ed. 1846]; Trecothick vs. Austin, 4 Mason [C. C.], 16; Petersen vs. Chemical Bank, 32 N. Y. 21; Harper vs. Butler, 2 Pet. 240; Cow. & Hills, Notes p. 872.)

W. C. Foreman, for Defendant in Error.

I. The claim sued on and the money sought to be recovered, if it ever became absolutely the property of David T. Morton, forms assets of his estate in the State of Missouri; and an administration should be opened in this State for the collection of such assets and administering upon them according to law. (1 Wagn. Stat., 115, § 24; 10 Mo., 724; Kelly's Prob. Guide, 295.)

VORLES, Judge, delivered the opinion of the court.

This was an action in the nature of an action for money had and received. The petition is as follows :

"Plaintiff for an amended petition herein says, that during the year 1860 David T. Morton was the executor of the last, will and testament of Mary B. Darr, dec'd, and duly qualified and acting as such in the county of Marion; that on the ninth day of July in said year, defendant was the attorney of said David T. Morton, executor as aforesaid, and that on said day, said David T. Morton as client of said defendant as aforesaid, deposited in the hands of defendant, as his attorney as aforesaid, the sum of one hundred and thirteen dollars and sixty cents, on the account of the estate of said Mary B. Darr, deceased, to liquidate demands against said estate as aforesaid. Plaintiff says that defendant accepted and received said money from said David T. Morton as aforesaid, being the property of said David T. Morton for said purpose, and in consideration of the premises, the defendant agreed and undertook with said David T. Morton to apply said money to the payment of demands against said estate, of Mary B. Darr, deceased, said undertaking being in writing and filed with the petition herein; but defendant has wholly failed and neglected

to comply with said undertaking, and has not applied said money or any part thereof to the payment or liquidation of any demands against said estate, but continues to retain such sum.

"Plaintiff says that afterwards to-wit : On the—day of—in the year—said David T. Morton paid off and discharged all liabilities due from him to said estate and was fully released, and discharged from his executorship and all liabilities thereon to said estate.

"Plaintiff says on the 27th day of December in the year 1837, said David T. Morton departed this life at Lexington, in the County of Fayette and State of Kentucky, and leaving his last will and testament whereby he made and constituted plaintiff his sole legatee and devisee of all his property, and his sole executrix; and plaintiff further says that on the—day of January, in the year 1868, said will was duly proved and admitted to probate in the office of the clerk of the County Court of said county of Fayette, and letters testamentary were thereafter duly issued and granted to plaintiff as his sole executrix, by the said County Court of said county and plaintiff thereupon duly qualified as such executrix and entered upon the discharge of the duties thereof.

"Plaintiff further says, that all debts and liabilities due or accruing from said testator or from his estate have been paid and satisfied in full, and the estate of said David T. Morton fully administered, and final settlement has been made of said estate of said David T. Morton, and plaintiff fully discharged and acquitted as said executrix, the laws of said State requiring said proceedings and no more. Plaintiff says that there are no debts or liabilities due or accruing from said testator or his estate to any person in the State of Missouri.

"Plaintiff says that on the—day of—in the year 1872 she by attorney demanded of defendant said sum with lawful interest; but defendant refused and neglected to pay the same, wherefore plaintiff asks judgment for the same."

To this petition the defendant filed a demurrer on the general ground that the petition did not state facts sufficient to

constitute a cause of action. The court sustained this demurrer and rendered final judgment thereon against the plaintiff; to which action of the court the plaintiff at the time excepted, and has brought the case here by writ of error.

The principle point discussed in this court is as to the right of the plaintiff to sue in the courts of this State to recover a debt due to a person who resided and died in the State of Kentucky, where his estate had been fully administered, and who, by his last will which had been duly probated in Kentucky, bequeathed all his property to the plaintiff, and was not in any manner indebted in the State of Missouri. These facts are all stated in the petition and admitted by the demurrer.

If this suit had been brought by the plaintiff in her representative capacity as executrix of the estate of David T. Morton, it is clear that she must fail, as her appointment and qualification as executrix in the State of Kentucky would give her no authority to sue, as such, in this State. This is too well settled to admit of controversy, and, in fact, it is averred in the petition that the estate of said Morton had been fully settled in the State of Kentucky, and the plaintiff finally discharged from her duties as the executrix of said estate, so that no suit could now be brought by her, in the State of Kentucky, in her capacity of executrix.

In this case, however, the plaintiff does not pretend to sue in a representative character, she sues in her own right, claiming to be the owner of the debt or claim against the defendant for the money placed in his hands and the question is, is she the owner of the demand in such sense as will enable her to maintain an action in this State for its recovery? In the case of *McCarty vs. Hall*, (13 Mo., 480,) it is held that an administrator appointed under or by virtue of the laws of another State cannot indorse a promissory note made payable to the intestate, by a citizen of this State, so as to give the indorsee a right of action, in this State, in his own name. This same principle has been recognized in the decision of a late case by this court, and, although respectable authorities

have been cited to the contrary, that may be considered the settled law of this State.

It is contended by the plaintiff that the case under consideration does not come within the principle decided in the case of *McCarty vs. Hall*. In that case the plaintiff claimed title to the note by virtue of an assignment made by a foreign administrator whose acts were confined to the administration of the property found within the jurisdiction of his appointment, while in the case under consideration the plaintiff looks to no administrator or other person acting in a representative capacity for her right or title to the property, but she claims, by virtue of the will of her husband who died in Kentucky, and whose will was duly probated there. If the title to the claim sued on vested in the plaintiff by virtue of the laws of Kentucky where the will was probated, it is difficult to see why she could not enforce her rights in or to the property, or to the demand, wherever the debtor or the property should be found; so that it will be seen that the material question to be settled is, did the bequest in the will of Morton, made and probated in the State of Kentucky, after his estate had been fully administered and settled, have the effect to vest title to the demand in the plaintiff?

It is, of course, admitted, that if Morton was indebted in this State, the courts here would see that the creditors were first paid out of the property here and the rights of plaintiff would be subservient to the rights of the creditors here; but it is averred in the petition in this case and admitted by the demurrer that there are no debts against the testator in this State. This being admitted it would seem that there is no good reason why the plaintiff's title to the demand is not perfect, or why she could not recover the same in the courts of this State. In the case of *Trecothick vs. Austin*, (4 Mason's C. C. 16,) this very question was considered by the court.

The language of Judge Story, who delivered the opinion of the court, is so pertinent that I will insert it here. The learned judge states:

"The true answer, however, to this objection, so far as it applies to the plaintiff, is, that he does not sue in any representative character whatever. The right he claims is a personal and private right belonging to himself and in no sense to another. He may not be able to establish such a right; he may not be able to trace a sufficient title to sustain him; but he claims nothing as the representative of Trecothick; he claims simply as a *cestui que trust* under his will, and as an assignee under that of the representatives of the Tomlinson's. It is certainly not necessary to prove a foreign will in our courts, where such will constitutes but one step in the title of a party. If Trecothick had bequeathed a coach or other specific chattel to the plaintiff, and the executor had assented to the bequest and afterward it became necessary to sue for the same or to establish the right to the same in our courts, I do not understand that a probate and administration here would be necessary to establish the title. If a bill were brought in this court for a specific performance of a contract for the purchase of land lying in another State and sold by the devisee thereof under a will there made and proved, I do not understand that probate of the will is necessary before he can maintain such suit.

"Whenever the title to a thing passes by the *lex loci*, that title may, nay, must be, made out by such law, and that is all that is necessary. The reason why an administrator cannot sue in his own name for property here, is that the administration is local and confers such right only as to property within the jurisdiction. It is a limited right of representation of the deceased.

"But suppose a foreign administrator sells goods of the deceased in a foreign country, and they are brought here and the right to them is here contested in a suit, may not the party assert his title to them under the foreign will and administration without a probate here? A will bequeathing personal estate conveys that property wherever it may be situated, if the will is made according to the laws of the place of the testator's domicile. And it has never been supposed

that it was indispensable to the assertion of a title derived under such will, that there should be a probate in every place where such property was situated. It is only necessary where a party sues for it, not in his own right, but as the personal representative of the deceased."

If this opinion of Judge Story is to be considered good law here, it is decisive of this case.

The plaintiff in this case claims under the will of Morton which had been duly probated in Kentucky, the estate there has been fully administered, the whole of his property was bequeathed to the plaintiff and there are no debts against the estate here. What then is there in the way to prevent the perfection of her title?

We are referred by the defendant to our statute, as an obstacle in the way of the vesting of the plaintiff's title and her right to sue in the courts of this State, which is as follows:

When administration shall be taken in this State on the estate of any person who, at the time of his decease, was an inhabitant of any other State or county, his real estate found here, after the payment of his debts, shall be disposed of according to his last will, if he left any, duly executed according to the laws of this State, and his personal estate according to his last will, if he left any, duly executed according to the laws of his domicile and if there shall be no such will his real estate shall descend according to the laws of this State and his personal estate shall be distributed and disposed of according to the laws of the State or country of which he was an inhabitant. (1 Wagn. Stat., 115, § 24.)

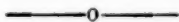
We are unable to see how this statute is to effect the plaintiff's rights. The property is personal property. It was bequeathed to the plaintiff, by a will made in Kentucky. The will was probated under the laws of that State, which was his domicile. The statute provides, that if administration had been taken here after the payment of the testator's debts, his personal estate shall be disposed of according to his last will. The petition avers that there are no debts in this State, and, of course, no administration is necessary to vest the personal

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property in the devisee, and our statute provides that the suit must be brought in the name of the real party in interest.

It has been urged by the plaintiff in this case, that as the demurrer only states that the petition does not state facts sufficient to constitute a cause of action, the objection that the plaintiff had no capacity to sue had been waived. That objection is a technical one and has been waived in the consideration of the case. The plaintiff's petition is rather inartificially drawn, but we think it is substantially good.

The judgment in this case must be reversed. The other judges concurring, the judgment is reversed, and the case remanded. Judge Sherwood did not sit.



ISHAM GILL, Appellant, *vs.* JOSEPH B. CLARK, *et al.*, Respondents.

1. *Equitable mortgage—Vendor's lien, etc.*—An instrument of writing not under seal, and not acknowledged, but otherwise in the shape of a mortgage, given by the vendor of land to secure the purchase money, has the same effect as a vendor's lien.
2. *Equity suits—Instructions in, improper.*—In equity suits, no declarations of law are proper, and if made will be disregarded by this court.
3. *Non-suit in equity will not bring law and fact up to the Supreme Court.*—A non-suit with leave to move to set it aside, will bring before the Supreme Court the questions of law and fact passed upon by the trial court, only when the non-suit is taken in a case at law. In equity cases, the court below must adjudicate upon the law and the facts, in order to bring them up on appeal or writ of error.

Appeal from Adair Circuit Court.

J. M. DeFrance, for Appellant.

I. The instrument, before it could convey any interest in the land or be any security, must be signed and sealed by the party making it. (Wagn. Stat., ch. 35, § 7.) Without a seal it is not binding between the parties. (Caldwell vs. Head, 17 Mo., 563; Moreau vs. Detchemendy, 18 Mo., 530.)

II. As to the law of vendor's liens and intentions to hold

the land as security in this State. (*Delassus vs. Poston*, 19 Mo., 425; *Pemberton vs. Johnson*, 46 Mo., 342.)

III. Taking a perfect mortgage on the land is no implied waiver of the lien. (*Stafford vs. Van Rensselaer*, 9 Cowen, 316; *Davis vs. Cox*, 6 Ind., 481; *Tobey vs. McAllister*, 9 Wis., 463; *Boos vs. Ewing*, 17 Ohio, 500.) Defendant Blair is the only person defending this suit, and it is overwhelmingly in proof not only that he knew of plaintiff's claim, but that he was to pay it off, as a part consideration to Clark for the land.

Harrington & Cover, for Respondents.

I. The instrument of writing made by Clark to Gill, although not under seal, is an equitable mortgage. (*Davis vs. Clay*, 2 Mo., 161; *Tibeau vs. Tibeau*, 22 Mo., 77; 2 Sto. Eq. [7 Ed.], § 1018.)

II. There is nothing in the point urged by appellant, that the mortgage must be under seal.

III. By the taking of the mortgage by plaintiff, (Gill) from defendant, Clark, to secure the payment of the note in question, plaintiff waived his vendor's lien. (*Delassus vs. Poston*, 19 Mo., 429.) It is a well settled principle of law, that the lien of a vendor is discharged by taking of any independent security, such as a deposit of stock, a pledge of goods, a mortgage on real or personal property, or the responsibility of a third person. (4 Kent Com., 153; 2 Sto. Eq. Jur., 475 n. 2; 2 Sugd. Vend., 59; *Brown vs. Gilman*, 4 Wheat., 255; *Fish vs. Howland*, 1 Paige, 20; *Williams vs. Roberts*, 5 Ohio, 39; *Conover vs. Warren*, 1 Gilm., 501; *Sullivan vs. Ferguson*, 40 Mo., 79; *Durette vs. Briggs*, 47 Mo., 356; *Adams vs. Buchanan*, 49 Mo., 64.) If the vendor does not intend to waive his lien, or there is an express agreement to retain it, he must show it by satisfactory proofs. (47 Mo., 356.)

ADAMS, Judge, delivered the opinion of the court.

This was an action to enforce a vendor's lien against lands held by the defendant, Blair, as a purchaser from the vendee.

The leading facts are that the plaintiff sold and conveyed the land, situated in Adair county, to the defendant, Joseph B. Clark, for \$1,450, of which \$800 was in hand paid, and a note for \$650 given by Clark to the plaintiff for the balance. At the time of the execution of the deed to Clark, he executed to plaintiff an instrument of writing, not under seal, but in the shape of a mortgage on the same lands, to secure the unpaid note, which instrument was not acknowledged, but was spread upon the record in the Recorder's office of Adair county. The said Clark afterwards sold and conveyed the same lands to the defendant, Blair, who denies by his answer, that he had any notice of any part of the purchase money remaining unpaid to the plaintiff, and alleges that he was a *bona fide* purchaser for value without notice.

The case being an equitable one, was tried by the court, and evidence was given conducing to show that the defendant, Blair, had notice at the time of his purchase of the unpaid purchase money due to the plaintiff.

After hearing the evidence, the court took the case under advisement till a subsequent term, and at such subsequent term the judge intimated that his opinion on the facts and law was against the plaintiff, and thereupon the plaintiff asked declarations of law, which were refused, and which it is unnecessary to set out. The plaintiff then took a non-suit with leave to move to set it aside, and did make this motion which was overruled, and he has appealed to this court.

A vendor's lien for the payment of this money undoubtedly existed in favor of the plaintiff, unless he had waived the lien, or unless the defendant was a *bona fide* purchaser for value and without notice.

There seem to be no facts upon which to predicate a waiver of the lien. The alleged instrument of writing, pledging the lands for payment of the note, was not a legal, but merely an equitable mortgage. It is precisely in effect the same sort of a lien as a vendor's lien. It does not convey back to the vendor the legal title, but transfers the equity to be held for the payment of the unpaid purchase money. It is in substance an

acknowledgment that a vendor's lien is held to secure the unpaid note. The foreclosure of the vendor's lien would in effect be a foreclosure of this equitable mortgage. Then how could that equitable mortgage be a waiver of a lien, where it may be treated as identical with such lien?

1. If it had been given on entirely different lands the question of waiver might have arisen.

2. From the facts presented by this record, I think there was evidence that the defendant, Blair, had notice of the lien when he purchased the lands, and these lands were therefore liable to this lien.

3. But the plaintiff did not let the court pass upon the case so as to bring it before us for review. In equitable suits no declarations of law can be made, and if made, will be disregarded in this court.

The plaintiff by taking a non-suit, in effect, voluntarily dismisses his petition without prejudice. A non-suit with leave to move to set it aside can only be taken in a case at law so as to bring before us the question of law and fact passed on by the court. In suits in equity, the court below must be allowed to adjudicate on the facts and law so as to authorize us to pass upon them on appeal or writ of error.

And in such suits this court will examine into all the evidence, and decide the case according to the preponderance of testimony and the law arising thereon.

Under this view the judgment must be affirmed. The other judges concur.

Morey, et al. v. Staley, et al.

NELSON L. MOREY, *et al.*, Defendants in Error, *vs.* MARY E. STALEY, *et al.*, Plaintiffs in Error.

1. *Lands and land titles—Evidence—Declarations asserting title.*—In a suit for the title to land, the declarations made by a party in possession, asserting his title are not competent testimony.
2. *Practice, civil—Witnesses, examination of—Time of, in equity proceedings.*—In equity proceedings the chancellor may in his discretion examine witnesses before the case is taken up.
3. *Equity—Evidence—Supreme Court.*—In equity suits, the Supreme Court is not bound by the finding, upon the evidence, in the lower tribunal.
4. *Equity—Conveyance—Title—Actual and constructive notice.*—Where the title to a tract of land was in the son, who made a power of attorney, authorizing his father to convey and the father does convey; but afterwards, on non-payment of the purchase money, he takes back the title to himself, and has such deed recorded, in a suit in equity to establish the son's title, the question in regard to an acquiescence of the son in such a condition of the title, is one of actual knowledge and not of such constructive notice as our statutes give to recording a deed.

Error to Perry Circuit Court.

Johnson & Nell, for Plaintiffs in Error.

I. The declarations of a party in connection with acts of ownership are admissible. (1 Phil. Ev., 217.)

Robinson & Clardy, for Defendants in Error.

I. The declarations of a party in possession are only admissible to explain such possession, and only then when they are against the interest of the possessor. (1 Phil. Ev. [3d Ed.], 193, 194, and foot-note 1 and authorities there cited; *Peaceable vs. Watson*, 4 Taunt., 16; *West Cambridge vs. Lexington*, 2 Pick., 536; *Little vs. Libbey*, 2 Greenl., 242; *Doe vs. Pettitt*, 5 B. & Ald., 223; *Criddle vs. Criddle*, 21 Mo., 522; *Turner vs. Belden*, 9 Mo., 797; *Cavin vs. Smith*, 24 Mo., 221; *Watson vs. Bissell*, 27 Mo., 220; *Burgess vs. Quimby*, 21 Mo., 508; *Wood vs. Hicks*, 36 Mo., 326; *Salmon's Adm'r vs. Davis*, 29 Mo., 181; *Curry vs. Lackey*, 35 Mo., 389; *Tucker vs. Frederick*, 28 Mo., 574; *Howell vs. Howell*, 37 Mo., 124; *Carne vs. Nicoll*, 1 Bing. [N. C.] 430; *Smith vs. Martin*, 17 Conn., 399; *Doe vs. Williams*, Cowp.,

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621; Gibbeney vs. Marday, 34 N.Y., 301; Keator vs. Dimmick, 46 Barb., 158; Barker vs. Ray, 2 Russ., 63; Davies vs. Pierce, 2 T. 53; Doe vs. Jones, 1 Camp., 367; 3 Am. Law Reg. [N. S.], 650.)

NAPTON, Judge, delivered the opinion of the court.

This is a proceeding to obtain a decree of title to a tract of land, lying on the Mississippi river in Perry county. The parties to the suit, plaintiffs and defendants, are the heirs of one Anson Morey, deceased.

The legal title to this land was beyond controversy in the plaintiffs, or rather two of them, who were sons of Anson Morey, from 1854 up to 1863. In that year the father, who had been before that acting as attorney in fact for his two sons, who lived in California, mortgaged the land as attorney in fact to secure some money he borrowed, and upon paying off the mortgage took a deed to himself—and in this way, upon his death in 1870, the legal title remained in him—and the land would of course go not only to the plaintiffs, but to the defendants who are also his heirs, unless the court would decree the legal title to the plaintiff.

And whether the two sons, plaintiffs were the real owners of this land, in equity as well as law, or the father, is the question of fact which was tried by the Circuit Court, on depositions and oral evidence, and found by that court, in favor of plaintiffs.

The Circuit Court found all the allegations of the petition to be true, and so far as the deeds, powers of attorney or other papers of record are concerned, no objection is made.

It seems that in 1854 the plaintiffs, Nelson S. and Anson H. Morey, bought this land for \$545, and a deed was made to them, that they executed a power of attorney to their father, authorizing him to sell it; that he did sell it in 1857, and to secure the purchase money took a deed of trust to his sons; and that it was sold under that deed and bought in by him, and the conveyance made by the trustee was to his sons, the plaintiffs; that in 1858, the sons, the plaintiffs, executed

another power of attorney to their father, under which in 1859 he conveyed to one Jones, to secure the payment of \$800 he borrowed on his own account; that he paid this \$800 in 1863 and at his request Jones made a deed to him and not to his sons, which deed was duly recorded. And this left the legal title in the father at the time of his death in 1870.

The theory of the defense is, that this land was originally bought with the father's money, that the title was put in his two sons then in California to enable him to keep off his creditors; that this device was adhered to so long as the father was in a state of pecuniary embarrassment, but when he became prosperous and the necessity ceased of protecting his lands by holding them in the name of his sons, he took the title in himself, and that the court should allow it there to remain.

Upon the trial the defendants offered to prove that the father, whilst in possession of the land, said it was his, and these declarations the judge excluded and this exclusion is made a point. Declarations by a party in possession explanatory of that possession and disclaiming title are always admissible because they are admissions against the party making them; but that a party can build up a title by his own declarations is not so clear. The declarations of the father in this case, disclaiming any title, were properly admitted—his declarations asserting title and ownership were excluded—and we think rightly. (*Turner vs. Belden*, 9 Mo., 797.)

The only other point of law made, during the trial, was, that the court allowed two witnesses who lived in Illinois, and who wished to get home to be examined before the court took up the case. The proceeding was before the court as a court of equity, and the time of examining witnesses was a matter in the discretion of the judge.

This court is not bound by a decree or judgment in a case of this kind, to regard the opinion of the court below on the facts as conclusive here, as it would be in jury trials or trials by the court, where juries are dispensed with. This court may

examine and decide the case without regard to the opinion of the Circuit judge.

The question here is, as it was below, whether the evidence authorized a decree. This evidence has therefore been carefully examined. There is a considerable conflict of evidence as to how the father, in the latter part of his life understood and represented his interest. There is no evidence whatever to show that the plaintiffs did not pay for this land originally.

The act of the father in taking a deed to himself, seems to have been without any authority whatever. Indeed it is so conceded.

The theory of the defense is, that this land originally belonged to the father, having been purchased by his money, and then the title was put in the sons to defraud the father's creditors. But there is no proof of this. For many years the father professed to act as agent of his sons and made all contracts in their name, and it was not until 1863—about nine years after the purchase by the sons—that he took a deed to himself, apparently without any authority from either of his sons, in whose name the title before that stood, and in whose name he had as attorney in fact executed and received all previous conveyances. If it had appeared that the sons—the plaintiffs—had actual knowledge of such a deed, then acquiescence for a number of years might well have been regarded as an admission of the title of the father. But there is no evidence on the subject. One of them lived in California till his father's death, and another returned here some years before and lived with his father and assisted him in the management of the farm. Whether either was aware of this deed to the father is a mere matter of conjecture. That it was duly recorded amounts to nothing in considering the questions arising here. Actual knowledge of such a deed having been made would naturally have led to efforts on the part of the plaintiffs to have the matter corrected, and if no such efforts had been made during the seven years it stood on the records, with their knowledge, it would strongly tend to a confirmation of the defendant's theory, that plaintiffs were never the real owners of the land.

But the plaintiffs were not allowed to testify in this case. There was no evidence tending to show that the plaintiffs or either of them had any knowledge of the deed to their father in 1863.

They knew, of course, from their own deeds and powers of attorney, executed by them on two occasions, that the title to this land was still in them, unless sold under such power of attorney by the father. They could not know that in disregard of his power, their father had in 1863 taken a deed to himself, unless the fact was communicated to them. Recording the deed in Perry county would certainly not impart information to a man in California. That is a mere fiction of law, established for wise purposes, that all the world must take notice of what is duly recorded; but it has no application to the question of fact examinable in this case.

Upon all the title papers or deeds produced in this case, it is quite clear that the Circuit Court could not have decreed otherwise than as it did. All the documents showed the title in plaintiffs, except the deed of 1863, which was taken in the name of the father and so far as it appears, without any authority, and in fact, so far as the previous deeds show, directly against the powers he professed to act under.

The parol evidence, after excluding the plaintiffs from testifying and all declarations of the father in support of his title, left the case very much as the deeds made it.

Therefore, after a careful consideration of the testimony, we have been unable to arrive at any other conclusion than the one reached by the Circuit judge. Judgment affirmed.

State v. Fritchler.

THE STATE OF MISSOURI, Respondent, *vs.* BENJAMIN FRITCHLER, Appellant.

1. *Criminal law—Larceny—Intent.*—A servant gave away certain old tools of his employer as a matter of charity. *Held*, not larceny. The act lacked the criminal intent.

Appeal from St. Louis Court of Criminal Correction.

M. W. Hogan, for Respondent.

F. & L. Gottschalk, for Appellant.

ADAMS, Judge, delivered the opinion of the court.

This was a prosecution upon an information for petit larceny. The information charges the defendant with stealing one set of butcher's iron scales, and one butcher's meat saw, the property of George Nicholas, the prosecutor.

On the trial the prosecutor testified in substance, that he was a butcher, that defendant was in his employment in February 1873, and had charge of his slaughter-house and every thing in it; that among the things there was a set of butcher's scales; that he looked for them to have them repaired, and asked defendant if he knew where they were and he replied that he did not know; there was also an old butcher's saw, which was broken but the bow remained; that he missed that at the same time. On the 9th of April he saw these articles in the possession of Christ Meyer, a butcher, keeping a stall in the Mound market in St. Louis.

Christ Meyer was then introduced and in substance testified that he was a butcher; that some time in January 1873, he went to the slaughter-house of prosecutor where defendant was employed; that he had before that time done some work there and on this occasion he told defendant that he was about to commence butchering for himself and as he was poor, he would be thankful to him, if he would assist him a little. He asked whether there were not some old tools there which he did not use. Defendant replied there were an old set of scales and a butcher's saw lying around there, which he did not use and that witness could have them. Witness afterwards called and

defendant gave him the scales and saw, and he took them and repaired them and used them; he paid \$ 1.25 for repairing the scale and \$1.00 for repairing the saw. When he got them they were useless, broken and battered. After they were repaired they were as good for use as new tools. Afterwards, about two weeks before the trial, the prosecutor came to witness' stall at Mound market, and said the scales and saw were his. Witness replied he could have them if he would pay for the repairs. The defendant who gave them to witness took them away.

Christ Hill was introduced as a witness and testified in substance to the same purport as the preceding witness.

This was all the evidence given or offered on the part of the State. The defendant then asked the court to declare that upon the evidence given he was not guilty of larceny. The court refused this instruction. The defendant then introduced several witnesses who testified to his good character for honesty, etc. At the close of all the evidence, the defendant asked the the court to declare the law to be that, "if it appear from the evidence, that defendant while in the employ of the prosecuting witness, did in good faith and out of charity, give the articles in the complaint mentioned to a poor person in need of assistance, and that those scales were of no value or of very small value and, not being used or needed by his employer and without any intent to convert them to his own use, then he is not guilty of larceny."

The court refused this declaration, and found the defendant guilty, the case having been submitted to it sitting as a jury.

The defendant excepted to the several rulings of the court, and filed a motion for a new trial which was overruled, and he has appealed to this court.

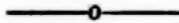
There is not a particle of evidence in this record to establish the defendant's guilt. There is a total want of proof of the *animus furandi*—the very gist of the offense charged.

It is the very sort of evidence upon which he might have relied to rebut the charge, if there had been any proof to establish it. It is very true that he had no legal right to exercise charity on the credit of his employer; but in doing so he only

laid himself liable to a civil action for the value of the goods, there being no felonious intent whatever to convert them to his own use.

The court erred in overruling the demurrer to the evidence and also in refusing the instructions asked by the defendant at the close of the evidence.

Judgment reversed, and the cause remanded. The other judges concur.



AMOS LUNSFORD, Respondent, *vs.* LA MOTTE LEAD CO., Appellant.

1. *Leases-Mining-Regulations-License to continue mining.*—In 1838, the proprietors of mine La Motte promulgated certain rules and regulations for the miners, who by signing them had a right to mine and extract minerals under their provisions for ten years. At the expiration of this time the proprietors made an agreement, by which miners might continue operations by subscribing thereto, on condition—among others named—that the agreement was to be revocable by the future action of the proprietors. *Held*, that the agreement was not a lease but a license, revocable at the pleasure of the proprietors. And where the miner, after the license was revoked, resumed work and extracted mineral without the consent of the proprietors, he was a mere wrong doer and acquired no title to the mineral by such wrongful act.
2. *Deeds-Seal-Scrawl-When necessary-Intention of parties.*—Where a deed purports to be executed under the hands and seals of all the parties, and is acknowledged as the deed of all, it is not necessary that a separate seal shall be placed opposite each name. If it appears that the seal affixed is intended to be adopted as the seal of each, it is sufficient.

Appeal from St. Francois Circuit Court.

B. B. Cahoon, & Jno. F. Bush, for Appellant.

I. The two scrawls, following the names or signatures to the deed, were a sufficient sealing of the deed for all the parties or grantors. In the absence of explanatory evidence the law imputes or attributes one of the two seals to Radcliffe B. Lockwood, and the other to William A. Scott, and Amelia Scott, his wife. (*Tasker vs. Bartlett*, 5 Cush., [Mass.] 359; *Bowman vs. Robb*, 6 Barr., 302; *Bohannons vs. Lewis*, 3 Mon-

Lunsford v. La Motte Lead Co.

roe, [Ky.] 378; *Towsend vs. Hubbard*, 4 Hill, [N. Y.] 357; *Ball vs. Dunsterville*, 4 Term, 313; *Mackay vs. Bloodgood*, 9 Johns., 285; *Perkins Conv.*, 59-134; *Washb. Real Prop.*, 570; 1 *Shep. Touch.* [Am. Ed.], p. 56-7; *Stark. Ev.*, 508.)

W. H. Nalle & M. L. Clardy, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This suit was brought in the Madison Circuit Court, and afterwards removed to the county of St. Francois, by change of venue. The action was in the nature of an action of trover and conversion.

The petition stated, that the defendant was a corporation organized under the laws of this State; that on or about the first day of June, 1870, defendant by its agents and servants unlawfully and willfully took, and carried away, one hundred and fifty thousand pounds of blue mineral or sulphuret of lead, the personal property of plaintiff, of the value of thirty dollars per thousand pounds, and converted the same to defendant's use, without the consent of plaintiff.

The petition further states, that by virtue of a written lease signed by the proprietors of the Mine La Motte or their agents, lawfully authorized, he was in possession of a tract or lot of mining ground, that is, one log house, one and one-half stories high, together with the appurtenances thereto, and a certain lot of ground formerly occupied by Christ. Belten, and bounded on the south by a lot formerly occupied by Bais & Co., the same being known as the "Lunsford Shaft," or the "Sulphuret Lead," being a part of the Mine La Motte tract of land situated in the counties of Madison and St. Francois; that as said lessee he had dug from and mined the said ores from said ground and placed them in the usual manner at the mouth of the shaft preparatory to having them hauled away and prepared for smelting; that the defendant through its agents and managers obtained from the judge of the Circuit Court at chambers an injunction restraining plaintiff from further mining in said shaft; that, after the issuing of said injunction, the defendant committed the trespass first charged.

Judgment is prayed for four thousand four hundred dollars.

The defendant in its amended answer denies all of the material allegations in the petition, except that it is a corporation organized under the laws of this State, and for another and other defense it states, that at the time of the supposed trespass and conversion of said mineral the defendant was the owner with the immediate right of possession of said mineral, and was the owner and had the right to the immediate possession of the said premises from which said minerals were dug, before and during the time of the pretended raising and extracting of said mineral from said premises by plaintiff; and that plaintiff at said time had no right whatever to the possession of said premises or to mine or remove mineral therefrom; and that any occupation of said premises or taking of minerals therefrom by plaintiff was a mere trespass upon the rights of the defendant, and for further defense defendant stated that plaintiff's claim, right or title to said minerals was the subject matter of and in issue in a cause which R. B. Lockwood & William Scott, from whom the defendant derives title to the premises which the petition describes, as plaintiff's, brought in the Madison Circuit Court against said plaintiff, being an action to enjoin said Lunsford from mining said premises, and for other purposes; that since the commencement of this action the proceedings to enjoin said Lunsford have been heard and determined by said court, and the claim which the plaintiff presents in this action, and his right to said minerals and premises, fully adjudicated; that such adjudication was had in September, 1871, and that the same was against the claim and title of plaintiff to said premises and mineral sued for in this action.

The defendant also sets up as a defense to this action, that before the commencement of this suit, and before plaintiff had dug and raised the mineral sued for, one Radcliffe B. Lockwood, who was at the time the owner in fee of the premises from which the minerals were taken, had commenced an action for unlawful detainer against said plaintiff to recover the possession from said plaintiff of the premises from which said minerals were taken or mined; that in the month of

September, 1869, said Lockwood recovered a judgment against said plaintiff for the possession of said premises, and that said minerals sued for were wrongfully mined and taken from said premises after such judgment and before the writ for the possession of said premises issued thereon was executed by the officer in possession thereof; that defendant purchased said premises of said Lockwood, and after said purchase said minerals were mined and raised without its consent, and in defiance of its rights, etc.

The defendant also set up several other defenses which it is not necessary to notice. The plaintiff filed a replication denying the new matter set forth in the answer.

A trial was had in the Circuit Court before a jury. The jury after hearing the evidence returned a verdict for the plaintiff for the sum of four thousand dollars.

The defendant filed a motion for a new trial, which being overruled it excepted and has appealed to this court.

The record in this case contains over two hundred pages, and is filled with exceptions taken by the parties to the various rulings of the court during the progress of the trial. The instructions alone, to which exceptions are taken by the parties, cover twenty-two pages of the record; but with the view which I have taken of this case, it will only be necessary to notice a few points urged by the parties in this court.

It appears from the bill of exceptions, that there is a large tract of land situate in the counties of Madison and St. Francois in this State, which is known by the name of the "Mine La Motte Domain;" that the lands are mining lands; that in May, 1838, the owners of this tract of land, for the purpose of facilitating mining thereon, promulgated a set of rules and regulations for the government of their agent, who was to take charge of the mining operations, as well as for the government of those who should work the mines and take minerals therefrom. Each person who proposed to extract minerals from these lands was required to stake off the ground on which he proposed to work, and place objects at the corner, so as to plainly designate the land to be worked, and was compelled

to sign his name to the rules and regulations promulgated. These rules by their terms were to go into operation on the 6th day of August, 1838, and it is agreed by the parties, that they were by their terms to expire in ten years from that date. Portions of these rules and regulations were read in evidence by the plaintiff on the trial of the case, and are as follows: "Article 1st. It shall be the duty of the agent of the La Motte Mines and property to attend to the fulfillment of the following rules and regulations established for the interest of all whom it may concern."

"Article 2nd. Persons desirous of mining, smelting, or transacting business, within the limits of the La Motte Domain, are requested to inform the agent of their intention. No person shall be permitted to commence operations without having his name to these laws."

Articles one and three of the second sub-division of these rules and regulations read as follows:

"Of Smelting." "Article 1st. All ores found or extracted within the limits of the La Motte property shall be smelted upon said premises without contrary permission from the agent."

Article 3rd. No grant or permission will be delivered, thereby empowering a person or persons to the privilege of smelting under these formalities, without such person or persons previously give bond conditioned with a penalty, and approved security, the refusal or acceptance of such security being at the option of the agent. The further condition of said bond shall be, a faithful account of the whole quantity of lead made shall be kept, and that he or they shall deliver or cause to be delivered to an appointed place, or warehouse located on the premises, ten pounds of merchantable lead out of every hundred pounds made; such one-tenth being the property; rent or tax, due the company from those enjoying these privileges."

The signature of plaintiff is to these rules, but it is not shown at what time his name was subscribed.

The plaintiff also read in evidence from a book, called

"Register of Mine La Motte No. 3," the following entries: "1848, Aug. Those, whose signatures are hereto annexed, are permitted to mine upon the Mine La Motte Domain, and raise any mineral contained under the surface thereof, conditionally that they sell no ores thus raised to any other persons than such as will smelt the same on the said domain. This agreement to be subject to, and revocable by, future action of the proprietors."

This register is signed by the agent of the proprietors, and it was shown that on pages succeeding plaintiff's name was signed, not in his own handwriting but by his authority, thus, "Amos Lunsford, 1853," August 9, 1856, Amos Lunsford."

Then the plaintiff, for the purpose of showing that the regulations under the "Register No. 3" still continued to be used in the year 1869, showed, that in said book, after several blank leaves intervening between all other entries on the book and the one to be read, the name of the plaintiff appeared thus, "1869 Feb'y 16, Amos Lunsford & Co." This last signature was proven to have been taken from Lunsford at a school house, and was by his authority put on the book by a man who was only agent for a part of the proprietors and owners of the mine.

The evidence shows, that plaintiff together with two or three partners commenced in the month of February 1869 to take mineral out of the "Lunsford shaft," and between that time and the month of June in the same year took from said shaft several thousand dollars worth of mineral.

In June 1869, Floming and others, owners of the mining lands, being about to sell out their lands, which included the lot in which the Lunsford shaft was sunk, gave Lunsford and other miners on the La Motte Domain notice to cease mining, and yield up the possession of the lands used and mined by them to the owners of the land.

When this notice was given, the miners all ceased work and abandoned their shafts, except one company which remained for awhile with the consent of the proprietors.

Lunsford's partners abandoned the Lunsford shaft finally, and do not claim to have had any interest in the mine since.

Lunsford himself ceased mining, but gathered up and took care of the ore already mined. After the Lunsford shaft had thus remained unused from June until October 1869, Radcliffe B. Lockwood, a part owner of Mine La Motte, having contracted to sell his interest in said lands to the defendant, and being desirous to have plaintiff quit the possession of the house in which he lived and the improvements connected therewith, again demanded the possession thereof in writing, and commenced a suit against him of unlawful detainer, after which plaintiff again commenced to dig and raise mineral out of the Lunsford shaft, and continued to so take the mineral from said shaft and deposit the same at the mouth thereof for some ten or twelve days, at which time he was enjoined from further operating said mine or shaft. After this injunction the defendant by its agent, it having as it claimed become the owner of the "Mine La Motte Domain," which it claimed to have purchased before the mineral sued for had been taken from the mine, took possession of the whole tract of land including the "Lunsford shaft," and carried away and converted the mineral extracted from said shaft by plaintiff in the month of October, 1869.

During the trial of the case before the Circuit Court the defendant, in order to show its title to the land and mineral, read in evidence several deeds of conveyance, by which said lands or interest therein were conveyed to it, and then offered to read in evidence a deed which purported to have been executed by one Radcliffe B. Lockwood, and by one Scott and his wife. This deed purported to convey to defendant a large and controlling interest in said tract of land, and was necessary to complete defendant's title thereto.

The deed was objected to by the plaintiff, on the ground that it was not under seal so far as Lockwood was concerned. The deed purported to have been executed under the hands and seals of all three of the grantors, but it had only two scrawls or seals placed opposite the names of the parties as they were subscribed to the deed; and these were placed opposite to the names of Scott and wife, and none placed oppo-

site to the name of Lockwood. The court sustained the objection made to the deed, and refused to permit the defendant to read it in evidence as the deed of Lockwood, but permitted it to be read as the deed of Scott and wife.

To this action of the court the defendant excepted. The defendant had by other deeds shown that portions of the interest or title on the land had been vested in it, but the exclusion of this deed left a large undivided interest or title to the land outstanding. Other evidence was given by the defendant tending to prove its title to the land and mineral, which need not be here referred to. The plaintiff claims that he was in the lawful possession of the mining shaft by virtue of having subscribed the rules and regulations of the proprietors of the land, that he by signing the same became their tenant or lessee and as such was in possession of the shaft, and that when he extracted the mineral it became his property, and that he had therefore a right to recover against the defendant for its conversion, even if it should be proved that the defendant was the owner of the land where the shaft was made.

The defendant claims, that the plaintiff was working in the mines under a revocable license, and that the license was revoked in June, 1869, by the notice served on him at that time by the proprietors of the land, in which the plaintiff and his partners acquiesced for several months; and that therefore, when he commenced in October, 1869, to take out mineral against the will of the owners, he was a mere wrong doer and could not by his wrongful act acquire any title in the mineral so wrongfully extracted against the owners of the land, that the mineral so extracted still remained the property of the owners of the land.

The right of the plaintiff to extract and hold the mineral sued for must depend on the construction of the regulations and agreement under which he was mining, and under which he claims title.

The rules promulgated on the 19th of May 1838, and which took effect on the 6th of August 1838, expired on the 6th of

August 1848, unless they were continued in force by the after action of the parties; so that, we must ascertain, by what was done after that time or at their expiration, how and by what right the plaintiff held and worked the "Lunsford shaft" in 1869. It will be seen that in August 1848, just at the time the first rules promulgated were to expire, the "Register of Mine La Motte No. 3" was adopted by the agent of the company, and agreed to by such miners as subscribed the same. The plaintiff claims to have subscribed and agreed to this register at different times. It is to be supposed that these different signings related to different shafts or mines staked out by the plaintiff at different times; but he only read parts of the regulations in evidence. It cannot therefore be clearly seen what was the object of these different signings by the plaintiff.

The mining register seems to have been a regulation, made between the agent of the proprietors of the mines and those mining on the land at the expiration of the first regulations promulgated by the proprietors in 1838.

That part of the register read in evidence by the plaintiff reads as follows: "1848 August. Those, whose signatures are hereto annexed, are permitted to mine on the Mine La Motte Domain, and raise any mineral contained under the surface thereof, conditionally that they sell no ores thus raised to any other person than such as will smelt the same on the said domain. This agreement to be subject to, and revocable by, the future action of the proprietors."

This was signed by the agent of the proprietors and by the plaintiff. To properly construe this instrument, we must keep in view the circumstances under which it was executed.

The proprietors had first promulgated rules and regulations for the miners, who, by signing the same, had a right to mine and extract minerals under their provisions for the term of ten years after August 1838. At the expiration of this time the agent of the proprietors made an agreement, called the Register No. (3), by which miners might continue to mine and open mines by subscribing this register or agreement, upon

the condition therein stated. One of these conditions was, that the agreement was to be revocable by the future action of the proprietors.

The plain construction of this agreement seems to me to be, that it was a revocable license, to be revoked at the pleasure of the proprietors of the land, and was not, as contended by the plaintiff, a lease. It was a mere permission to work the mines for an unlimited time, to be revoked by the proprietors at their pleasure. Such a license might be revoked at any time, and this seems to have been the understanding of the miners who signed the agreement, for it appears by the evidence that, out of over twenty miners working mines under this agreement in June, 1869, all ceased to work or claim any further right to work or extract ores from the mines after being notified to quit by the owners of the land in June, 1869; and in fact the plaintiff and his partners, on being notified to quit in June, 1869, ceased work, and the partners never resumed work or claimed any further right in the mines after that time. But the plaintiff in the next October, for some reason, resumed work and claimed the right to exhaust the mineral from the shaft where he had worked by virtue of his old license or agreement. After the plaintiff had been notified in writing by the owners of the land to quit working the mine, and yield up the possession of the land, in June, the license ceased, was revoked, and when he afterwards in the October following resumed work and took out minerals without the consent of the owners of the land, he was a mere wrong doer, and acquired no title to the mineral by such wrongful act.

The title to the minerals thus wrongfully extracted remained in the owners of the land. And it was the duty of the court to so tell the jury by a proper instruction. The main error of the court, however, was in excluding the deed offered in evidence by the defendant to show that it had acquired the title of Lockwood and Scott to the land from which the mineral had been extracted.

The deed was excluded as the deed of Lockwood, and as to

his interest in the land, and the jury were instructed that the plaintiff could recover as to said interest, for the reason that the title to that extent was not shown to have passed to, or vested in, the defendant.

The case was tried upon the theory that the defendant had shown no title to Lockwood's interest in the land, and that therefore the plaintiff could recover for the mineral to that extent.

This deed ought to have been admitted in evidence. It purported to have been executed by all of the grantors. Two seals or scrawls were placed at the end of their names. It is true, that neither of the scrawls was placed opposite the signature of Lockwood, but the deed purported to have been executed under the hands and seals of all of the parties, and was acknowledged as the deed of all.

In such case, it is not necessary that a separate seal should be placed to each name. If it appears that the seal affixed was intended to be adopted as the seal of each, it is sufficient. See the opinion of Walworth, Justice, in the case of *Townsend vs. Hubbard*, 4 Hill, (N. Y.) 351; *Tasker vs. Bartlett*, 5 Cush. (Mass.) 359; *Stark. Ev.*, by Sharswood, 508, and authorities there cited.

There are a great many other points made in the case, but the points referred to and passed on are sufficient to dispose of the case.

Judge Adams not sitting, the other judges concurring, the judgment is reversed, and the case remanded.

ROBERT A. MAY, Respondent, *vs.* ROBERT F. LOCKETT, Appellant.

1. *Forcible entry and detainer—Disseizin—Title.*—In an action of forcible entry and detainer the defendant cannot raise the question of title when he is in by disseizin.
2. *Forcible entry and detainer—Landlord and tenant—Sheriff's sale for tenant's interest—Disseizin—Statute, construction of* —A. leased premises to B., who sub-let them to C. At an execution sale against B., A. purchased B.'s interest in the premises, and took a sheriff's deed therefor. A. requested C. to attorn to him or surrender possession to him; C. refused to do so, but locked up the premises, and left them before the expiration of the lease. A. took possession the next day. *Held*, that A. obtained possession of the premises wrongfully, and without force, by disseizin, and, after a written demand for the premises from B., was guilty of unlawful detainer under the statute (Wagn. Stat., 642, § 3).
3. *Landlord and tenant—Sales—Attornment—Statute, construction of.*—When premises have been sold by the owner or by proceedings *in invitum*, the tenant thereof can attorn to the purchaser under the statute. (Wagn. Stat., 880, § 15).

Appeal from St. Charles Circuit Court.

E. A. Lewis, for Appellant.

I. The deeds, not admitted by the court, were offered to fortify the evidence of the tenant's surrender of the possession to defendant. It was in evidence that those deeds, etc., were exhibited to the tenant to induce her to surrender.

J. A. Kellar, for Appellant.

I. After the lease the lessor parted with this title by sale *in invitum*, and therefore the tenant became the tenant of the grantee. (Egland vs. Slade, 4 Durn & E., 681; Jackson vs. Davis, 5 Cowen, 123; Jackson vs. Rowland, 6 Wend., 666; Gregory's heirs vs. Crabb's heirs, 2 B. Monroe, 234; Nellis vs. Lathrop 22 Wend., 121; Tilghman vs. Little, 13 Ill., 239.)

II. It was competent for appellant to show this transfer of title, and thus show that he, and not the respondent was entitled to the possession at the time stated. (Gunn vs. Sinclair, 52 Mo., 327; Pentz vs. Kuester, 41 Mo., 447; Tilghman vs. Little, 13 Ill. 239.) Otherwise §§ 36, 37, (Wagn. Stat., 648,) are inoperative, and the right of the heirs of a deceased lessor to recover possession could never be enforced.

Lackland & Broadhead, for Respondent.

I. The property was in the possession of the plaintiff after the tenant vacated and abandoned it. (May vs. Lockett, 48 Mo., 472.) If in plaintiff's possession, then the entry of defendant was unlawful, no matter what his title may be. (Wagn. Stat., 646, § 26.)

ADAMS, Judge, delivered the opinion of the court.

This was an action of unlawful detainer, which was commenced before a justice of the peace, and removed to the Circuit Court by *certiorari*, where it resulted in a judgment in favor of the plaintiff.

This case was before this court at the October Term, 1871, and is reported in 48 Mo. 472. There is no material difference between the facts of the case as there reported and as now presented by this record.

The leading facts are, that the plaintiff was in the actual possession of the premises by and through his tenant, and that while so in possession the defendant, or his landlord, bought the premises at execution sale against the plaintiff, and took a sheriff's deed for the same. After thus buying them they applied to the plaintiff's tenant to attorn to him or to surrender the possession to him. The tenant refused to do so; but removed from the premises before the expiration of the lease, locking the door and leaving the key in it. The next day the defendant, without the consent of the plaintiff, who was then absent residing in Indiana, entered into the possession of the premises, and still holds the same after demand in writing by the plaintiff for such possession.

It is manifest from these facts, that the defendant wrongfully, and without force, by disseizin obtained possession of the premises in dispute; and, when he refused to deliver up such possession on the written demand of the plaintiff, he was guilty of unlawful detainer within the meaning of the 3rd. section of the act concerning Forcible Entry and Detainer. (Wagn. Stat., 642, § 3.) After thus being guilty of an unlawful detainer, he has no right to protect his possession by a sheriff's deed, nor by any other deed for the premises, whether made by the plaintiff or by some other person holding the real title. The question

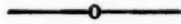
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of title cannot be raised where a party is in possession by disseizin. It is only where he has legally obtained the possession, that he can protect it by showing a deed from the plaintiff, or by a purchase and sheriff's deed at execution sale against the plaintiff.

The case of *Gunn vs. Sinclair*, 52 Mo., 327, so much relied on by defendant's counsel, is not in conflict with the doctrines here maintained.

The plaintiff in that case was the defendant's landlord, and during the pendency of the tenancy the defendant bought at execution sale the plaintiff's interest or title, and when sued in unlawful detainer by his landlord he was allowed to set up his execution purchase to defend his lawful possession. The court also held, in that case, that there is no distinction between sales *in invitum* or by the party himself holding the title. In either case, a tenant under section 15 of the Landlord and Tenant Act (2 Wagn. Stat., 880), can attorn to the purchaser. If the plaintiff's tenant had attorned to the defendant, and afterwards refused to deliver the possession at the end of the lease, he might have maintained an action for unlawful detainer and used his sheriff's deeds to prove his right to the possession.

The instructions given covered the whole case, and are substantially correct. Let the judgment be affirmed. The other Judges concur.



THE STATE OF MISSOURI to use of JACOB H. BURROUGH, Administrator *de bonis non* of the estate of WILLIAM JOHNSON, deceased, Defendant in Error, *vs.* SARAH L. FARMER, *et al.*, Plaintiffs in Error.

1. *Administrator's bond.—Failure to approve, etc.*—The failure of a County or Probate Court to approve an executor's bond does not render it invalid.
2. *Administration—Witness "to contract or cause of action."*—In a suit by an administrator *de bonis non*, against the sureties of the former administrator or executor to recover monies, charged to have come into the hands

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of the former administrator as such, and not accounted for by him, *Held*, 1st. That it is no defense to said action for the sureties, to show that certain demands had been allowed against the estate which were barred by the statute of limitations. The question whether such claims were properly allowed, is wholly immaterial and collateral to the issues to be tried, and are not proper subjects of inquiry in the cause :

2nd. That the testimony of the administrator of the former executor who is then dead, was competent to prove payments made by the deceased executor during his life-time, on claims or demands against the estate ; and as to what was said by said executor at the time of said payments. The subject matter of such testimony was not the contract or cause of action then in issue, nor was the witness the other party to the action.

Error to Cape Girardeau Court of Common Pleas.

James B. Dennis, for Plaintiffs in Error.

Louis Houck, for Defendant in Error.

VORIES, Judge, delivered the opinion of the court.

This action was brought against the defendant on an executor's bond.

William Johnson died in Cape Girardeau county in the year 1864, leaving a will in which his wife Sarah L. Johnson, John H. Clark and John H. Wilson were named as his executors. The will was proved and recorded in said county, and on the tenth day of August, 1854, the parties named as executors in the will appeared in the proper Probate court and executed their bond in the usual form as the executors of the estate of the deceased in a penalty of twenty-five thousand dollars, with Thomas Johnson, James Cannon and Alfred Lacy as sureties, procured letters testamentary, and entered upon the discharge of their duties as executors. In 1866 Mrs. Sarah L. Johnson was married to James C. Farmer, who is joined in this suit.

John H. Wilson in the year 1865, removed to the State of Mississippi where he still resides. John Clark died in 1868 and W. H. H. Williams was appointed his administrator, and is joined as such as a defendant in this suit.

At the trial the suit was dismissed as to Wilson and Tracy who were not served with process. At the May term of the Cape Girardeau Court of Common Pleas for 1871, (that court

having probate jurisdiction) the letters as aforesaid were revoked and Jacob H. Burrough for whose use this suit is brought, was appointed administrator *de bonis non* of said estate, and qualified as such.

This suit was brought on the bond executed as aforesaid, by the executors of the estate of William Johnson, deceased, to recover certain sums of money, which, it was charged had come into the hands of said executors as the assets of said estate, and which had not been accounted for by them in the payment of the debts of the estate or otherwise, but had been wrongfully converted to their own use.

The petition further charges, that there were debts proved up against said estate in favor of the guardian of the heirs of one McLean, for over four thousand dollars which remained unpaid, notwithstanding there was money in the hands of the executors applicable to the payment of said debts; but that the money had been by the executors converted to their own use, and the debts still remained unpaid.

The breaches of the bond were assigned in the petition in the usual form, and damages claimed in the sum of five thousand dollars.

The defendant, Sarah L. Farmer, in her separate answer, admits the execution of the bond sued on, but denies the indebtedness of the estate and claims that she renounced the will and that she has never acted as executrix of the estate of her late husband, and that nothing ever came into her hands as such.

The defendants, James Cannon and Thomas Johnson, deny the execution of the bond and deny that the principals in the bond were the executors of the estate, or that the will was ever probated, or that the principals in the bond ever took upon themselves the administration of the estate. They also deny that the estate was indebted as charged in the petition, and charge that the debts named in the petition as being unpaid were barred by the statute of limitations at and before the time they were proved up and allowed against the estate; and that the demands as proved were barred by the statute

of limitations as to said defendants at the time this suit was brought, &c.

Replications were filed to all affirmative allegations in the several answers. A trial was had before the court, a jury having been waived by the parties.

The plaintiff to sustain the issues on its part, read in evidence, the bond executed by the defendants as charged by the petition. This evidence was objected to by the defendants on the ground that it had not been approved by the Probate court, and because there was no administration under the will. The objections were overruled by the court and the defendants excepted. The plaintiff then offered and read in evidence the letters of administration *de bonis non* issued to Burroughs, and an order of the Probate court directing the former executors to deliver and pay over to him the assets of the estate in their hands.

The plaintiffs then offered in evidence, two allowances of demand, as they appeared on the records of the Probate court against said estate in favor of the guardian of the heirs of McLean. One of these allowances was made on an account, and another on a note. Plaintiff also offered in evidence said note and account with the certificate of their allowance indorsed thereon, together with credits indorsed on said claims of various payments thereon.

When these allowances were read in evidence the defendants Johnson and Cannon moved the court to non-suit the plaintiff, as to said defendants, on the ground that they were the sureties on the bond of the other defendants and that it was shown by the said allowances that they were barred by the statute of limitations at the time they were allowed.

This motion was overruled by the court and the said defendants excepted.

The plaintiff then without objection read in evidence the annual settlement of the executors, Clark and Wilson, made in the Probate court showing the amount of assets in their hands, &c.

The plaintiff then read in evidence from the records of the

Probate court an order by which an auditor was appointed by the Probate court to take an account of the assets of said estate, and the indebtedness thereof, in connection with which an order was also offered showing the report of said auditor and its confirmation by the court with an order made by the court requiring the distributees to refund to the executors certain amounts out of what had been distributed to them for the purpose of paying the debts of the estate.

This evidence was objected to for the reason that it conflicted with other evidence in the case.

This objection being overruled the defendants excepted. The plaintiff then introduced defendant Williams as a witness, who had at one time been the guardian of the McLean heirs in whose favor the claims against the estate named in the petition had been allowed, for the purpose of proving by said witness among other things, the amounts paid by the executor Clark to him on said claims, and also to prove that other monies of Clark, which had come into his hands while he was such guardian, had been by the direction and consent of Clark applied on other indebtedness of Clark to him in his individual capacity. The defendants objected to this evidence on the ground that Clark, one of the parties was dead, and that Williams the other party to the transaction, was therefore incompetent as a witness to testify in reference to said transaction, and because Williams was testifying in his own favor. These objections were overruled and the defendants excepted.

The plaintiff then introduced oral evidence tending to show the amounts which had come to the hands of the executors to be by them administered and the amount refunded to them by the distributees under the order of the court, &c. It was proved by Mrs. Farmer, that she had renounced the provisions made in her favor by the will of her husband, and had elected to be endowed under the law, and that she had taken no part in the administration of the estate but had entrusted the whole matter to her co-executors. The other defendants objected to this evidence but their objections were overruled, and they excepted.

The defendants offered other evidence tending to show that the executors had paid several amounts on the claims proved up in favor of the McLean heirs, but it was admitted by all parties that nothing had been paid to the McLean heirs on the demands proved in their favor, further than what had already been shown by the credits on the account and note allowed, as read in evidence by the plaintiff. The plaintiff offered to read in evidence the last will of Johnson, deceased, with the proof thereof as indorsed on the same. To the reading of this will the defendant objected, on the grounds that it did not appear that the will had been probated and because it conflicted in some matters with other evidence in the cause. This objection being overruled, the defendant excepted.

No instructions or declarations of law were asked on either side or given by the court, but this case was simply submitted to the court on the facts and evidence.

The court rendered a judgment in favor of the plaintiff for the amount of the penalty of the bond and authorized an execution for the sum of \$3,086.00, with costs.

The defendants filed a motion for a new trial assigning some eight or ten causes, covering all of the exceptions taken on the trial, as well as on the ground of newly discovered testimony since the trial, which last ground was supported by several affidavits, also filed. This motion being overruled by the court, the defendants again excepted and have brought the case to this court by writ of error. :

There are no questions of law raised in this case, except the admissibility of the evidence objected to by the defendants at the trial, and as to the proper exercise of the discretion of the court in overruling the defendant's motion for a new trial on the ground of newly discovered evidence.

The first objection made by the defendants, is that the court permitted the executor's bond to be read in evidence, when it did not appear that the bond had been approved by the Probate court. It has been frequently held by this court, that an administrator's bond was good; though not approv-

ed by the County or Probate court. (Henry vs. State, 9 Mo., 778; James vs. Dixon, 21 Mo., 538.) The bond was properly admitted in evidence, and the letters testamentary sufficiently show that administration was entered into under the bond and will.

The next objection made by the defendants necessary to notice, is the objection of the defendants to the introduction in evidence of the entries of allowances, made by the Probate court in favor of the guardian of the heirs of McLean, and also to the introduction in evidence of the claims thus allowed with the credits made of the payments thereon.

This evidence was objected to by the defendants, or rather the defendants as the record shows, moved a nonsuit on the ground that it appeared by the said allowances that more than three years had elapsed after the granting of letters testamentary and before the demands were allowed, and that they were therefore barred by the statute of limitations.

It seems to me the defendants conducted their defense under the notion that the suit had been commenced for the use of the guardian of the McLean heirs, in place of the administrator *de bonis non* of Johnson's estate.

Whether these claims were properly proved up, or were properly provable against Johnson's estate, is a question wholly collateral to the real matters in controversy in this suit, and could not be inquired into on the trial thereof.

The question in this case is, did monies and assets come into the hands of the executors of the estate of Johnson for which they have not accounted as such executors; but which have been converted to their own use? It was only necessary for the plaintiff in its petition to refer to any unpaid allowances against said estate, for the purpose of showing that the estate had not been fully administered, and finally settled, so as to authorize an administrator *de bonis non* to be appointed. When such administrator was appointed it is made the duty of the former executors to pay over to him whatever remains in their hands, whether the estate is in-

debted or not. The administrator *de bonis non* when appointed, has the right to sue for and collect the assets for the purpose of properly distributing the same, and when in this case, he recovers the assets, it will then be a question for him to decide whether he will pay the demands in favor of the McLean heirs or not? It may therefore have been immaterial and unnecessary to a recovery by the plaintiff, that the evidence of these demands should have been introduced; but I cannot see how the evidence could effect the right of the defendants. In fact there were various receipts indorsed on these claims in favor of the executors, which would tend to lessen the recovery against them, and to assume as the defendants do, that these claims were barred by the statute of limitations and therefore improperly allowed, would be to charge the defendants with the amount paid by the executors on the same. So that it will be seen, that whatever effect the evidence could have in the case, would be directly in their favor and they have no right to complain.

The defendants objected to the reading of the entries on the records of the Probate court, in evidence, by which it appeared that an auditor had been appointed to inquire into the condition of the estate, and his report to the court and the order of the court requiring the distributees to refund, &c. The ground of the objections was that it conflicted with other evidence in the case. This objection was properly overruled as the objection could only effect the weight to be given to the evidence and not its admissibility.

The next point urged in this court is that the court improperly permitted the defendant Williams, to testify in the case as to what application was made of certain monies received by him from the executor Clark, in his life-time, and that such application had been made by the direction of, and with the consent of Clark. It was insisted that Clark being dead, the witness was not competent to prove a transaction had between him and Clark in his life-time. It was certainly competent for the witness to testify as to the payments made by Clark to him as the guardian of the McLean heirs in extinguishment

of the demands of the estate, and whatever was said by Clark at the time and forming a part of the transaction was also admissible, and further, the matter to which the witness referred was not the contract or cause of action in issue, but was wholly collateral thereto. How does it come within the exception in the statute, which provides, that where an executor or administrator is a party, the *other party* shall not be admitted to testify in his own favor, unless the contract in *issue* was originally made with a person who is living. Here the witness was not the *other party*. He represented Clark in this suit, and the witness was not testifying in reference to any contract in issue in the cause. It has been repeatedly held by this court, that such evidence is admissible and the witness competent. It is insisted by Mrs. Farmer in this case that she is not responsible for the acts of the other executors in reference to matters in which she did not participate. The bond on which this suit is brought is a joint bond of all of the executors, in which case each is liable as surety for the acts of the other, so far as the acts relate to the business of the estate, and it makes no difference that one of the number did not actively participate in the act. (*Lidderdale vs. Robinson*, 2 Brock, U. S. C. C., 159; *Green vs. Hanberry*, *Id.*, 403.)

There were several other objections made by the defendants in their brief filed in the cause, but by an examination of the record the facts do not appear, upon which the objections seem to be founded.

The remaining questions presented are as to the correctness of the finding and judgment of the court on the facts and evidence, and as to the propriety of the action of the court in overruling defendant's motion for a new trial on the ground of newly discovered evidence.

It is insisted by the defendants that the court committed error in the calculations and estimates by which the amount found against the defendants was arrived at; but there is nothing in the record from which we can see how or by what rule or calculation the result was obtained. No instructions or declaration of law were asked or given so as to indicate in

Bedford v. Moore.

what the assumed error of the court consists or what rule was adopted by the court in arriving at the result, or what evidence was relied on and what was rejected. In such case this court will not interfere, unless something appears on the record from which it plainly appears that a mistake or a palpable miscalculation had been made. Nothing of that kind appeared in this case. We are therefore, not justified in interfering with the finding of the court as to the facts. The affidavits filed in the case, disclosing the new evidence discovered, after the trial are wholly insufficient. The evidence disclosed is of three classes. First, evidence that is only cumulative disclosing facts already proved or upon which evidence has before been given. Second, evidence which is clearly inadmissible, and would not have been properly admissible if offered on the trial. And third, evidence that for aught that appears could with ordinary diligence have been produced on the trial, and in fact it is shown that the evidence that is thought to be the most material, was known to the witness in court by which the facts could have been proved.

We see no cause to interfere with the judgment in this case. Judges Wagner and Adams not sitting. The other judges concurring, the judgment is affirmed.

—o—

LOUISIANA BEDFORD, Appellant, vs. JAMES L. MOORE AND JOSEPH C. MOORE, Respondents.

1. *Trusts and trustees—Redemption—Acceptance of part of land in satisfaction.*—Where a party at a judicial sale constitutes himself a trustee, by deterring others from bidding, and the party entitled to redeem accepts a deed for part of the land tendered in satisfaction, it amounts to a bar to further redemption.

Appeal from Mississippi Circuit Court.

Louis Houck, for Appellant.

Glover & Shepley, for Respondents.

ADAMS, Judge, delivered the opinion of the court.

The petition sets out that the plaintiff is the widow of one Alfred M. Bedford, deceased; that in his life-time the said Bedford owned certain real estate, being the east half of the south-east quarter of section 6, township 26, north range 16 east; that he mortgaged this property, and that defendants became the holders of that mortgage by assignment; that by decree of the Mississippi Circuit Court the equity of redemption of said Alfred in said real estate was foreclosed, but at the time of said purchase it was understood by said Alfred and defendants that the said foreclosure should not debar the said Alfred, his heirs or assigns, from redeeming said real estate, by the payment of the mortgage money and interest and costs, and that with that understanding the said real estate was sold under said decree, and that defendants became the purchasers for \$500, being about the one-sixth part of the real value of said real estate; and that the said realty would not have sold for such an inadequate price, but for the fact that defendants on the day of sale publicly proclaimed, that if they became the purchasers of said realty, the said Alfred should have the right to redeem the same on payment of the amount due on mortgage.

The petition further states, that said Alfred died in January, 1870; and that he did not redeem in his life-time; that since his death, plaintiff being entitled to dower and homestead in said realty, paid the amount due on said mortgage, with interest and costs, and in addition to that, another large debt of said Alfred, to redeem said land and discharge it from all liens and incumbrances whatsoever due to defendants; and that the defendants, although paid in full, have refused to reconvey said real estate; wherefore the plaintiff prays, that they may be compelled so to do.

The defendants deny every allegation of the petition, and set up that on or about the 29th day of November, 1865, during the life-time of said Bedford, by virtue of several executions, all the interest of said Bedford in said land was sold to one George Whitcomb. The defendants in their answer further state, that on the 22nd day of May, 1868, the equity of

said realty was sold to George Whitcomb by virtue of a decree of foreclosure obtained in the Mississippi County Court, and that Alfred M. Bedford owned no equity of redemption, and had no right to redeem the said realty. And further defendants say, that the plaintiff has long since relinquished her right of dower and all other right or title she ever had or held in or unto said land, except seventy acres which defendants conveyed to her. And James L. Moore for himself says, that he never at any time had a conversation with Alfred M. Bedford, in regard to the said land. And in conclusion, the defendants say, that they admit that the amount of money in the petition specified was paid, but deny that it was paid for redemption, but that it was paid upon another consideration, that it was paid as the purchase price.

In her replication, the plaintiff denies all the allegations of the answer.

At the May Term, 1873, this cause was tried. At the trial Louisiana Bedford introduced herself as a witness and testified, that it was always her understanding that by paying the money she should have the land—that she saw Mr. Joseph C. Moore in regard to the redemption of the land, and that he asked her if she could not by some means hold on to the land, and that she told him that she had no means except some swamp land—that at no time did Mr. Moore intimate that he intended to hold on or keep a part of the land—that she always understood that if she paid the money she should have all the land back. On cross-examination she says that she does not remember that Jos. C. Moore told her, that she, her husband and Mr. George Whitcomb had conveyed to Mr. Thomas Allen one-fourth of the south 40 acres, excepting the house, but says that she remembers that to be a fact, that she does not remember that Jos. C. Moore, in any conversation with her expressed a desire to hold back a part of the land; that at the time she talked to Jos. C. Moore at his office, James L. Moore was there, and taking part in the conversation; that she did not have possession of the money that was paid to the Moores, that Mr. Patterson acted as her agent and attorney; that she

has an interest in this suit; that the suit is prosecuted for her benefit; that she expected to get all the land when the money was paid; but that it came different; that she never promised Mr. Deal to convey the one-fourth in dispute to Mr. Deal or any one; that she never had a conversation with Mr. Deal about the matter.

H. J. Deal then testified that he was at the sale, when the land in controversy was sold, that he made one bid, and that Jos. C. Moore told him that the matter was understood between him and Mr. Bedford, and that he thinks Mr. Moore told him not to bid, that he was going to let Mr. Bedford have the land back, and that after that statement he bid no more; that the land sold for \$500, and was worth some \$4,000 or \$5,000, and that would be a fair valuation. On cross-examination he said, that Thomas Allen paid 3,300 dollars for the property; that when the sale was going on he put in a bid to clog the thing, in order to get time to investigate; that he cannot state exactly what Jos. C. Moore said, but that he did say that he was buying the property in for Mr. Bedford, with a privilege in him to redeem, and for him not to bid; that he has an interest in the result of the suit; that Thomas Allen furnished the money to redeem; that Thomas Allen and he furnished the money to get a part of the land; that Mrs. Bedford has an interest in this suit; that if she does not make a deed to us as she agreed, we will hold her for damages; that she gave a bond for the entire land.

Wm. H. Sherman testifies that he was present when the land was sold, that he made two bids, but made no other bid from some information that he got from Jos. C. Moore; that he asked whether the property by the sale would pass into other hands, and that he understood that it would not; that he cannot give the exact words; that the land sold for \$565, that it is worth \$3,000; that what Mr. Moore told him deterred witness from bidding any further on the day of sale, and that Moore told him that if there had been a general bidding he would have withdrawn a part of the land; that the land was sold in a lump. On cross-examination he said, that he

made bids after the conversation, and that he was deterred from bidding from what Moore said more particularly.

W. P. Swank testified, that he was at the sale; that at the sale Moore said that whenever Alfred M. Bedford paid the money he would get his land back; that he thinks this was at the time of sale; that the land is worth \$50 per acre exclusive of the Bedford dwelling house, and that the house is worth \$1,500. On cross-examination he said that the conversation was on the day of sale, and that his understanding was, that whenever Bedford paid the amount of the mortgage he was to have his land back.

James L. Patterson testified that he knew the Moores and Bedford; that he knew the land; that it is the homestead tract; that for the purpose of redeeming this homestead tract he paid \$3,200 or \$3,300 to Jos. C. Moore for Mrs. Bedford; that Mr. Moore handed him a deed for all the land except about 10 acres; that he paid the money to redeem the entirety of the land; Mrs. Louisiana Bedford is the widow of Alfred M. Bedford, and the land in controversy is a part of the homestead. On cross-examination he said that he never talked to James L. Moore about it.

Jos. C. Moore swears, that he paid James L. Moore a part of the \$500 mortgage debt, half of it.

The plaintiff also introduced the deed from Jos. C. Moore and James L. Moore, from which it appears that in consideration of \$3,270 they convey to Louisiana Bedford the north-east quarter of the south-east quarter of section 5, township 26, N. R. 16 east, containing 40 acres, and the undivided three-fourths of the south-east quarter of the south-east quarter of section 6, same township and range, that remains after deducting the right of way of the St. L. & I. M. R. R., and other reservations more specifically set out, and unnecessary to be noticed in this abstract. This deed is dated April 13, 1871.

The plaintiff also introduced the deed from Jackson, sheriff, to the Moores, dated Nov. 19th, 1869, from which it appears, that the east half of the south-east quarter of section 6, T. 26, N. R. 16 east, was sold by virtue of a foreclosure of a mortgage dated the 26th day of May, 1855, for the sum of \$565.

The defendants then introduced Jos. C. Moore, one of the defendants, who said that he had an interview with Mrs. Bedford; that she wanted him to make her a deed, and that he told her he thought that Bedford's children had some interest in the land; that she said she was buying the land with her own money, and that he agreed to convey to her all the land except the land she had sold to Thomas Allen, with her husband and George Whitecomb, and the particular pieces conveyed to the I. M. R. R. as right of way—and a piece of land conveyed to Mr. Byrd, and upon which he had built a warehouse, and which she had conveyed her dower interest—she agreed to that—I made a deed for the land, except the above pieces; that his understanding was that the money was paid as the purchase price of the land, and that she was buying the land at that price; that no particular words were used at the time; that he does not remember the conversation with Deal; that the statement of Sherman is in substance correct; that the conversation with Patterson is in the main correct; my understanding was a sale and his a redemption; I conversed after the sale, and I think I said that if Bedford would pay all he owed us, I would re-convey the land; I think I said that. On cross-examination he said, that the conversation between Mrs. Bedford and a witness took place before he got the money; but will not be positive, that he refused to convey all the land, and made the exceptions referred to already; that after his refusal to convey all, the widow took what we conveyed, and that since she has deeded the land to Thomas Allen; and witness states that he is a lawyer.

J. H. Bethune then testified, that he heard Jos. C. Moore remark to him, that if Mrs. Bedford was not satisfied with the deed, trade or matter, she could have the money back, and that Moore told him to tell Patterson so; and witness says that he thinks he told him; does not remember whether Patterson made a reply or not; the impression of witness is, that Patterson said the money was not wanted, but the land.

The defendants then introduced a deed of mortgage, signed by A. M. Bedford alone, dated the 8th day of December, 1857,

to the County of Mississippi of the east half of the south-east quarter section 6, T. 26, N. R. 16 east—the land in controversy—to secure the payment of \$800; to the introduction of which deed of mortgage the plaintiff objected, on the ground that the said deed of mortgage cannot affect the rights of plaintiff, cannot avail defendants, and is immaterial and irrelevant; but the objection was overruled, and the plaintiff duly excepted.

Next the defendants introduced a deed of mortgage from A. M. Bedford alone, to J. L. Moore, Treasurer of Constantine Lodge No. 129, A. F. A. M., for the east half of the south-east quarter, section 6, T. 26, N. R., to secure the payment of \$550; to the introduction of which mortgage deed, the same objection was made as before, and with like result.

The defendants then introduced a deed from Lazarus W. Pritchett, sheriff, dated 29th day of November, 1865, from which it appears that by virtue of various judgments obtained subsequent to the mortgage to the Constantine Lodge in 1855, the east half of the south-east quarter of section 6, T. 26, N. R. 16 east, was sold to George Whitcomb, on the 21st day of November, 1865; to the introduction of which deed the same objection was made as heretofore and with like result.

A deed from Bedford and wife to the St. Louis & Iron Mountain Rail Road—right of way—dated July 22nd, 1867, was next introduced by the defendants. This road passes through the land in controversy, and there is no dispute about the right of way.

The defendants next introduced a deed from A. M. Bedford and Louisiana Bedford, his wife, and George Whitcomb, to Thomas Allen, dated 14th day of September, 1868, from which it appears that one undivided one-fourth part of 40 acres in section 6, T. 26, N. R. 16 east, is conveyed to Thomas Allen; the land is described by metes and bounds, and is embraced in the south-east quarter of the south-east quarter of section 6, T. 26, N. R. 16 east; but the conveyance is made upon the express condition that the I. M. R. R. shall locate its depot on the land, and it is further agreed that the parties in interest, Bedford and wife, Whitcomb and Allen, shall give the

railroad six acres for railroad purposes ; and it is further understood, that the mortgage on the land is to be released by the partners of the first part, and the deed contains a general warranty of title.

The defendants then introduced a deed dated May 29th, 1868, from Jacob L. Shelby, sheriff, to George Whitcomb, for the east half of south-east quarter, section 6, T. 26, N. R. 16 east, sold by virtue of a foreclosure had in County Court.

Also defendants introduced another deed from Jos. C. Moore and James L. Moore, to the St. L. & I. M. R. R., dated January 15, 1870, (objected to as irrelevant, but objection overruled, and ruling excepted to).

The defendants then introduced the release of Louisiana Bedford of her dower interest in the warehouse tract described particularly in the deed, and also reserved in the deed from the Moores to Mrs. Bedford, dated.

The plaintiffs then re-introduced James L. Patterson, who said that he paid the money as Mrs. Bedford's agent to the Moores, at the office of Jos. C. Moore ; that he does not remember that Moore said if the deed was not satisfactory, to return it ; that Mr. Bethune said that Moore said so ; that he did not communicate what Bethune said Moore said to Mrs. Bedford ; that when he and Moore were negotiating about the land, "we always used the word redeem;" that he heard Moore say, that he was not in a condition as an honorable man, to make a deed for all the land to Mrs. Bedford, as he had promised Mr. Loughborough, Allen's agent, not to put it out of his power to convey the land to Allen—that when Moore handed him the deed for a part of the land only, he asked him, "are you going to convey the land not in the deed to Mr. Allen?" Moore then said it would depend on how Mr. Allen acted in regard to promises he made to him. On cross-examination, he said, as agent and attorney of Mrs. Bedford, he directed this suit to be brought, and that Mrs. Bedford had repeatedly ratified his action.

This was all the evidence. The court dismissed the bill. Motion for a new trial and re-hearing was made, but by the

court overruled, and the plaintiffs duly excepted. The cause comes here by appeal.

The foregoing is the printed statement of the case, as made by the appellant's attorney.

1. From this statement, it is evident that when the defendants purchased the mortgaged lands under decree of foreclosure, they did so with the understanding that Alfred M. Bedford, the mortgagor, might redeem. Even if there had been no such understanding, the facts and circumstances attending the sale would constitute the purchasers trustees by implication.

When a party at a judicial sale, by his acts and declarations, prevents others from bidding, and purchases the property at a sacrifice, he becomes thereby a trustee to hold the title for all parties interested.

2. This suit is brought by the plaintiff, as widow of Alfred M. Bedford, who died without redeeming the lands. The plaintiff claims the right to redeem upon the alleged ground that, as a widow, she had a dower in the lands and also a homestead.

If it be admitted that she had the right to redeem, is she not barred from redeeming the ten acres in dispute, after what transpired between her and the defendants? Through her agent she offered to redeem all the lands including the ten acres in dispute, but the defendants had made some disposition of this ten acres, and would not agree to convey it to her. Her agent then accepted a deed for the balance of the land, except some parts about which there is no dispute, and this deed was delivered to the plaintiff and accepted by her.

The agent was informed that if she did not want the land conveyed he would return the money and take back the land.

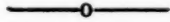
The defendants understood that the plaintiff was making a purchase, but the plaintiff looked upon it as a redemption. Viewing it in either light, the transaction ought to be a bar to any further redemption. The agent merely understood that the defendants would only make a deed for the lands conveyed, and unless this deed was accepted in satisfaction of

all right to further redemption, they would not make any deed at all. This is the manifest inference from the testimony on both sides. If the plaintiff did not intend to stand by this conveyance as a final settlement, she ought to have rejected it.

There seems to be no dispute about the power of the agent to transact the business. It was his duty to reject the deed unless accepted on the terms it was tendered. As he accepted it with a full understanding of its import, and as the plaintiff took it from him without objection, the presumption is that she stood upon this settlement as final and conclusive.

Under this view it is unnecessary to discuss the points in regard to the admissibility of the several deeds read by the defendant.

Let the judgment be affirmed. The other judges concur.



STATE OF MISSOURI, Respondent, *vs.* WILLIAM BARRETT, Appellant.

1. State vs. Burns, *ante*, p. 274, affirmed.

Appeal from St. Louis Criminal Court.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted with Christopher Burns, for committing the crime of rape. At the trial he was convicted, and sentenced to imprisonment in the penitentiary. The case is essentially the same as State vs. Burns, decided at this term, and presents no new points for review.

We have seen no error in the record and the judgment must be affirmed. The other judges concur.

State ex rel. Chouteau, et al. v. Leffingwell, et al.

STATE OF MISSOURI, *ex rel.*, CHOUTEAU, *et al.*, Relators, *vs.*
H. W. LEFFINGWELL, *et al.*, Respondents.

1. *Corporations—Municipal purposes—Forest Park—Taxation, special and general.*—Under the provisions of the act to establish Forest Park, (Sess. Acts, 1872, p. 255) a district outside the city of St. Louis was incorporated. The commissioners created under it and having its exclusive management and control in no instance resided within its boundaries. Those owning lands within it were to be taxed for its establishment and support, against their consent, by persons having no interest in common with them. It was declared to be "for a municipal purpose of great importance to the city of St. Louis, conducive alike to the dignity and character of the city, and the recreation, health and enjoyment of its inhabitants." But the inhabitants of St. Louis were not to be taxed in anywise on account of it. *Held*, 1st. That the park was not established for "municipal purposes" within the meaning of § 4, Art. VIII, of the State Constitution; 2nd. That it authorizes a special tax for the purpose of a general public character; and that for these reasons the act was void.

ON MOTION FOR RE-HEARING.

1. *Constitution—Corporations for municipal purposes—Meaning of term.*—A corporation, "for municipal purposes," as contemplated by §§ 4, 5, Art. VIII of the State Constitution, is either a municipality, such as a city or town, created expressly for local self-government with delegated legislative powers, or it may be a sub-division of the State for governmental purposes, such as a county, a school or road district, etc.; but it must embrace some of the functions of government, local or general; and no corporation not exclusively designed for this end can be properly denominated a municipal corporation.
2. *Constitution—Municipalities—Corporations, independent of.*—The Constitution did not contemplate that corporations, independent of a city government, should perform any of its functions.
3. *Revenue—Taxation—Street openings—Public Park.*—The doctrine which justifies special taxation against adjoining property holders for supposed benefits, as in the matter of street openings, has no application to public parks. A lot holder has a property interest, or easement, in the adjoining street, independent of the public parks. Not so, however, with lots fronting on public parks.

T. T. Gantt, for Relator.

I. The act establishing Forest Park is special, while its objects could have been accomplished by general law.

II. The act is in violation of §§ 4, 5, Art. VIII, of the State Constitution. Under these clauses, no corporation, except a city, can be erected by special legislation. A corpor-

ation for municipal purposes and a municipal corporation are the same thing. The terms are convertible. (Dil. Mun. Corp., Ch. 2, 9; Ang. & Ames' Corp., §§ 14, 15.) But Forest Park is not, in any proper sense, a municipal corporation. The essence of such a corporation is that there be inhabitants of a particular locality, who are incorporated for the purpose of local government. Nothing of the sort is shown in this act. Forest Park is not an appendage of the city of St. Louis. It is "in St. Louis county, west of the city of St. Louis."

III. This act authorizes the levy of a tax for the purposes of the proposed corporation outside of its limits. This cannot be done. (*Wells vs. City of Weston*, 22 Mo., 384.)

Glover & Shepley, for Relators.

I. The act creating the corporation of "The Commissioners of Forest Park," attempts to create a corporation which the act declares to be for a municipal purpose outside of the city of St. Louis, at the same time declaring that the municipal purpose is solely connected with the city of St. Louis. The park was, at the passage of the act, about, at its nearest point, one and a half miles from the western limits of the city of St. Louis. As far as any constitutional question is concerned, it might as well have been established at Glencoe, twenty miles from the city of St. Louis.

II. The act on its face declaring that it is the creation of a corporation for municipal purposes, and not being the incorporation of a city, is in violation of §§ 4 and 5, Art. VIII, of the constitution. It is clear from the context, that the municipal corporations allowed to be chartered by special law, were the same corporations and those only, which were excepted in the 4th clause, and which were more particularly pointed out and designated by the 5th section.

It is contended that the legislature can incorporate any corporation by special act, so that it is for a municipal purpose. It would be, on this theory, competent for the legislature to incorporate, by special act, a coal company, so that its object was, and was expressed to be, for the "municipal purpose" of

furnishing the city of St. Louis with cheap coal; or if a gas well was discovered outside of the city of St. Louis, by special act, to incorporate a company for the purpose of utilizing it for the advantage of the citizens of the city of St. Louis.

Such a proposition would enable any corporation to be created by the legislature, so that it was claimed to be for "municipal purpose," and every municipal purpose might be exercised by a separate corporation.

There is an express prohibition against the incorporation of any town under 5,000 permanent inhabitants, so that an incorporation of a town having only 4,500 people, would be void. But by the construction contended for, though such a legislative act would be void, it is entirely competent for the legislature, by special act, to incorporate persons to lay out, purchase and establish a park for the recreation and enjoyment of a town of 4,500 people, as that is "a municipal purpose of great importance to the town."

In *Horton vs. Mobile School Commissioners*, 43 Ala., 598, there was no constitutional prohibition to be construed. The word municipal, as used in the constitution, is construed by the constitution itself. If you change the words in the 4th and 5th sections from "municipal" to "banking,"—to "insurance,"—to "railroad," will any one say that there was a different sense in the 4th section, when it speaks of "banking purposes," &c., from that conveyed by the 5th section, when it speaks of banking corporations?

As to the incorporation of counties, which it is said, under our construction, there is no power in the legislature to institute, we reply that, the institution of counties is a political sub-division made by the State for the more convenient exercise of its sovereign power. It is not correctly a corporation, but a *quasi* corporation, as stated in *Bush vs. Shipman*, 4 Scammon, 190; *Han. & St. Joe. R. Co. vs. Marion Co.*, 36 Mo., 294, also 555.

III. The statement in the third section of the Park act, that it is "impossible to make any provision by a general law to effect the desired object," does not relieve the act from the prohibition contained in the 27th section of the 4th Art.

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1. This section has nothing to do with corporations. This is apparent from the context.

2. If the provision was so general in its character as to include corporations, then Art. VIII declares what corporations can be created by special laws.

3. It is patent from the Act, that provision could have been made for creating parks in cities by general law.

4. The recital in the Act, that no law of a general nature could be passed to affect the object (even if Art. VIII had not fixed the matter as to corporations), is not to be taken as conclusive, but the question is to be judicially determined.

IV. It is not in the power of the legislature to tax persons and property not in the limits of a municipal corporation, for an object which in the act is declared to be for the benefit and advantage of the municipal corporation and its residents. (See *Wells vs. City of Weston*, 22 Mo., 384.)

V. If for any reason, the power of taxation in the act fails, the act must fall with it, for it is vital to the act, and without it the whole purposes of the act fail.

Sharp & Broadhead, for Respondents.

I. The plain reading of sections 4 and 5, of Art. VIII, of the constitution is: That Corporations may be created for municipal purposes by special act; but no municipal corporations except cities having a population of over 5,000 permanent inhabitants shall be created by special act. Hence, a county—a school district—a State University,—and such like *quasi* corporations established for municipal purposes, may be invested with corporate powers by special act. Unless a county is a corporation created for municipal purposes, and not strictly a municipal corporation, it cannot be established by special act. There is no express power in the constitution to create a county, and yet it is clearly contemplated that it may be done; (See Art. IV, § 21) and no one has doubted or disputed the power to do so by special act.

We must distinguish between those organizations, having a

few functions of a corporate existence, and some of those of a municipal character; and a municipal corporation proper. "This distinction is usually drawn between such corporations, as towns and cities voluntarily organized under incorporating acts, and involuntary *quasi* corporations such as counties." (Dillon on Municipal Corporations, p. 31, and note; Hamilton county vs. Wright, 7 Ohio State R., p. 109-118.) There are certain actions to which counties are not liable at the suit of private individuals, and to which cities are. In the case of cities, the inhabitants are regarded as having been clothed with municipal powers at their request, and for their peculiar and special advantage, and hence, to a certain extent, they are liable as private corporations; but not so in regard to counties, they are more peculiarly the agents of the State.

We must conclude then, that the term municipal corporation as used in the constitution, has a technical meaning, and that it is not synonymous with a corporation for municipal purposes. This was a wise distinction made by the framers of the constitution, and the language is used in the light of judicial decisions upon such questions.

That counties are corporations, see *Bush vs. Shipman*, 4 Scammon, 190; *Bradley vs. Case*, 3 Scammon, 603; see also, *Hear vs. Curators of State University*, 47 Mo., 225. As to the State University and its character as a public corporation, see also *State ex rel. Police Commissioners vs. St. Louis County*, 34 Mo., 570-572.

Municipal law is public law. (Bouvier's Law Dictionary, Tit. Municipal Law, Blackstone.) And so are municipal affairs public affairs, and municipal purposes are public purposes as contra-distinguished from private purposes.

And so the Constitution intends that corporations for public purposes may be created by special act, such as the Board of Water Commissioners, the Board of Police Commissioners, Board of Public Schools, counties, school districts, as agencies of the State to subserve the purposes of the public. And so the Legislature has declared in this act, (§ 3,) that the establishment of this Park is a municipal purpose.

A city, or purely municipal corporation, is a miniature government, having legislative, executive and judicial powers. It may pass laws, levy taxes, imprison for violation of law, authorize the issue of executions and the sale of property; but those *quasi* corporations, established for municipal purposes, have no such extended powers and are not intended from their very nature, to have them. They are mere agencies of the State to promote the convenience of the public at large.

II. As to the objection that the mode of taxation provided in the act operates unequally, and is unconstitutional, this cannot affect the question of the validity of the law establishing Forest Park, or the power of the Legislature to pass such a law under the provisions of the Constitution referred to. It will be time enough to meet those objections when an attempt is made to enforce those provisions of the law which are claimed to be unconstitutional. There is warrant enough for the Park Commissioners to act, and the court will not presume that they intend to enforce the unconstitutional provisions of the law, if there be any such.

Charles Gibson, & John W. Noble, for Respondent.

I. It is averred thatt he Forest Park act violates Sec. 27 of Art. IV. of the State Constitution.

We submit that the recital of the act that "it is impossible to make any provision by any general law to effect the desired object," (Sec. 3,) is or ought to be enough to create a doubt in the mind of the court whether such provision can be so made. This is a matter on which the action of the legislature must be conclusive. (State *ex rel.* &c. vs. County Court of New Madrid, 51 Mo., 82; State *ex rel.* vs. Boone Co. Court, 50 Mo., 317; Dill. on Mun. Corp., § 26, citing authorities; 29 Ind., 409, overruling; 5 Ind., 4; 32 Ind., 322; and Cooley's Const. Lim., 129, note; State vs. Ebert, 40 Mo., 190-1.) The Court of Criminal Correction would not be necessary throughout the State. It is in the nature of a police or municipal regulation and although highly necessary in one community may be wholly inapplicable in another. So we may well

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urge here, St. Louis is a great metropolis, promising rapid growth, in which the whole State is greatly interested, and a great park for it has many reasons to recommend it beyond one for any other place in the State. It is apparent a general law would not be necessary or applicable; we rest upon the decision on this point.

II. Does the act in question violate Sec.4, Art., VIII, that "corporations may be formed under general laws, but shall not be created by special acts, except for municipal purposes."

Observe the persons named in the act are incorporated without the possibility of the slightest pecuniary benefit to them, or any private advantage whatever. There is no stock to be subscribed, no salary or reward; no power of appointment of even their own successors; there is no acceptance necessary and their existence is at the will of the State.

The park is created by the State, for the use and enjoyment of the people forever; by the State, put under control of this corporate body that compensation from means furnished by the State may be duly made to owners of property taken; that the place may be appropriately arranged and controlled, and the purposes of the State fully obtained. The members of the corporation may be properly termed civil officers.

A member of the Board of Water Commissioners is a civil officer, he exercises a share of the powers of civil government and his authority comes directly from the State. (State vs. Valle, 41 Mo., 30-31.) So are commissioners appointed by the legislature to sign City Treasury warrants. (Garnier vs. St. Louis, 37 Mo., 554.)

If we may deem the members of the corporation, officers of the State, what kind of a corporation shall we style the corporation itself?

We are dealing day by day with a most valuable class of corporations which are public in their character, one well defined branch of which includes cities, towns, and villages, called municipal corporations, and another branch which though varying in application and peculiar features are but so many instrumentalities of the State to accomplish its great design

—the welfare of the people—and are in the broadest and most statesmanlike use of the term, for *municipal purposes*. It is the narrowest construction of language to say, that “municipal purposes” means only city, town or village purposes. (See Webster’s definition and Blackstone Vol. I, p. 44.)

We thus perceive that there are not only two classes of public civil corporations—but the word “municipal” has a double meaning, one a narrow, confined meaning as relating to a *municipium* or free town, or as we should say in the present age, relating to cities, towns and villages; and another broader and more usual signification relating to the State or nation. And therefore while the words “municipal corporations” have a well defined meaning and embrace cities towns and villages and nothing more, the words are not equivalent at all to those other words, “for municipal purposes.” The latter embrace by the common speech of men, before and since the days of Blackstone—State or national purposes. And therefore, while municipal corporations are for municipal purposes, there are other corporations for municipal purposes that are not strictly municipal corporations. In further exemplifications of this class of corporations we may refer to State Universities, Agricultural Colleges, Lincoln Institutes and Public Schools. The State is a corporation, a legal being capable of transacting some kinds of business like a natural person, and such a being is a corporation. (State of Ind. vs. Woram, 6 Hill, 33.)

From this enumeration we pass to direct adjudications upon the point involved. In *Horton vs. Mobile School Com’rs*, 43 Ala., 598, there was an act passed which repealed all prior laws except those creating corporations for municipal purposes, *Held*, that these were not words of technical import and should be construed to apply to a corporation to carry on a public free school and to raise funds for its support. (*Heller vs. Stremmel*, 52 Mo., 309.) Examination of the statute before us as to the peculiar nature of this corporation shows: First, that this park is, in the language of the act, “set apart and appropriated as a public park for the *free* use and enjoyment of the *people* forever.”

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This was within the authoritative and well recognized power of the State. On the ground that the public health, convenience and welfare will be promoted, the condemnation of private property for a park is authorized. (Central Park Extension, 16 Abb. Pr., 56; Park Comm'rs vs. Williams, 51 Ills., 57; or public square, Owners vs. Albany, 15 Wend., 374; or drains and sewers, Hildreth vs. Lowell, 11 Gray 345; or for pure water, Maryland vs. Co. Comm'rs, 4 Gray, 500; Bowden vs. Stem, 27 Ala., 104; and 25 Ala., 455; Reddall vs. Bryan, 14 Md., 444; Gardner vs. Newbury, 2 John. Chy., 162; Ham vs. Salem, 10 Mass., 350; Mayor vs. Bailey, 2 Denio, 433-446; Kane vs. Baltimore, 15 Md., 240.) The legislature is the sole judge of the necessity of exercising the power of eminent domain and the amount of land to be taken. The question is political and not judicial. (People vs. Smith, 21 N. Y., 597; Gresy vs. Railroad Co., 4 Ohio St., 308; Varick vs. Smith, 5 Paige, 137.)

It is also added in the third section of the act that the establishment of the park is a municipal purpose, of great importance to the city of St. Louis; conducive alike to the dignity and character of the city, and the recreation, health and enjoyment of its inhabitants and it is impossible to make any provision by any general law to effect the desired object. It is not necessary to elucidate largely the proposition that the park is of great importance, not only to the City, but the State at large. The City and State have interests in common. By such projects population is attracted; commerce follows, the basis of taxation is increased, a happy and prosperous community grows from year to year, within our borders, and the greatest good to the greatest number is attained.

The construction put upon the sections here now presented is not new in this State. By reference to an act entitled "An Act to provide for the government of the Tower Grove Park of the City of St. Louis" approved March 9th, 1867, p. 172; it will be perceived that a corporation is just as absolutely created as by the act in question (Sec., 3-4-5-18-22; also the next act p. 176.) But the term "municipal" may be allowed to have

in the fourth section even its more limited signification, and yet there would be no prohibition of this Board of Park Commissioners, because it may exist as an auxiliary or instrumentality to aid the city as well as the State, and yet may not in a strict sense be a municipal corporation.

It by no means follows, that in creating a city the State abandons to it all corporate control or action within its territorial limits. Examples to the contrary are abundant. In St. Louis the Police Commissioners are appointed by the Governor and responsible only to the State for their conduct. The Board of Water Commissioners might be here and in some cities are regulated in the same manner. What would hinder the State from forming these boards into corporations and if so incorporated would they not be for municipal purposes and yet not municipal corporations? It is by no means essential that the operations of such a board should be confined to the city limits. The Board of Health has jurisdiction far beyond the city limits. The city of New York has been endowed with power to bring pure water for many miles to the city and its Board of Water Commissioners has corresponding jurisdiction and authority. The several parks already existing in St. Louis were created at their origin beyond the city limits. But there is a fact that removes all difficulty on the score of locality, for it was but three days after the passage of the present act, before another act was passed extending the limits of the city over the whole of Forest Park, and creating the park district into one of the wards of the city. This being at the same session and before any organization of the corporation was possible, it follows that this corporation to aid the city has never existed nor attempted to exercise any right or franchise beyond the limits of the city of St. Louis. Here then we have within the most limited sense, sufficient warrant for our existence being as we claim a corporation for municipal (or city) purposes, but not a city. It is not until organization is completed that existence is given to the artificial being and its agency commences. (*Falconer vs. Campbell*, 2 McLean, 95; *Langhorne & Scott vs. Robinson*, 20 Grattan, 661.)

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III. We suppose the question of assessment for benefits cannot be raised here, but to avoid any misconception, as the authorities are abundant, we here present them. The constitutional provision is "that property subject to taxation ought to be taxed in proportion to its value." This corporation have nothing to do with this tax but to receive it after assessment and collection by officers of the State assigned to that duty and who are not parties to this action. This provision of the constitution relates only to the general revenue and has no application to assessments for local improvements on adjacent property. (Egyptian Levee Co. vs. Hardin, 27 Mo. 495; Egyptian Levee Co. vs. Cummins, 27 Mo., 495; Columbia River Bottom vs. Meier, 39 Mo., p. 56; 25 Mo., 264-268, and cases cited; 4 Comstock, 428-9; Lockwood vs. St. Louis, 24 Mo., 20; Garrett vs. St. Louis, 25 Mo., 505; Sheehan vs. Good Sam., Hosp., 50 Mo., 155; where are cited 11 Johns., 80; 13 Penn. St., 107; 2 La. Am., 329.) The principles applicable to the present case are closely applied in (Owners vs. Albany, 15 Wend., 374 (1836,) cited and noted, as above, Dill. Mun. Corp., 463, n. 2.) The power operating here is the State of Missouri. It uses no city or county instrumentality, but by its power of eminent domain erects a park "for the free use and enjoyment of the people forever." It requires a tax to be assessed by the public assessor as a special tax upon the adjoining district designated. Can it be said with any assurance, that the State cannot do what the city or county might do? We are familiar with sewer, plank road, pavement, alley and other special assessments, and in St. Louis with Lafayette Park, Tower Grove Park, and other Park assessments. Parks and sewers are but different means of preserving the common health. If the State can create a city and allow it to levy these special taxes, is it not absurd to say the State itself cannot do this? We leave this question to be dealt with by the court upon the authorities. On the one side is the ordinary pursuit by ordinary means of public good; on the other individual interests to withstand the common good. "*Salus populi suprema lex esto!*"

WAGNER, Judge, delivered the opinion of the court.

This is a proceeding by *quo warranto* against the defendants as commissioners of Forest park, and the purpose in view is to test the validity of the act establishing the park. The act was approved on the 25th day of March, 1872 (Sess. Acts 1872, p. 255), and the first section declares that a public park is established in the county of St. Louis, west of the city of St. Louis within certain boundaries designated, and then provides that the grounds embraced therein shall be set apart and appropriated as a public park, for the free use and enjoyment of the people forever.

The second section prescribes the manner of laying out the park; and the third section recites that the establishment of said park being a municipal purpose of great importance to the city of St. Louis, conducive alike to the dignity and character of the city and the recreation, health and enjoyment of its inhabitants, and it being impossible to make any provision by a general law to effect the desired object, therefore the defendants, naming them, are appointed commissioners and created a body politic and corporate, with power of succession, etc.

The fifth section gives the commissioners exclusive control over the park, empowers them to grade, lay off and ornament the same, to adopt and enforce all ordinances, rules and regulations which are needful and proper for the preservation of order and the protection of property, to employ a special police force, and to have and possess all the powers which are or may hereafter be conferred upon the city of St. Louis in respect to public parks.

The ninth section confers upon the commissioners authority to purchase the real estate of the owners embraced within the park, the title of which shall be to the people of the city and county of St. Louis, and if no agreement can be made for purchase at a reasonable price, then they are vested with power to proceed and have the same condemned.

By section 11, the commissioners are authorized to issue bonds not exceeding in amount the sum of \$1,200,000, to run

for twenty years, with seven per cent. interest, which are to be secured on the lands so purchased and condemned by such instruments in writing as the commissioners may agree upon and which are to constitute a first lien thereon; the proceeds of the bonds to be appropriated first to the payment in full for the lands so purchased or condemned, and the surplus, if any, to the necessary expenses and improvement of the park.

Section 12 then lays off a park district comprising lands surrounding the park within a designated distance; and section thirteen makes it the duty of the public assessor for St. Louis county to make an annual assessment for twenty years, and to levy a special tax of one per cent. upon all the real estate within said park district, and an additional tax of three mills on that part of the real estate in that district fronting on said park running back to the distance of 250 feet. It is then provided that "the said assessments shall be added to the general tax bills against said property and collected in the same way, and when so collected, the same shall be paid over to said commissioners, by whom it shall be appropriated and paid first in liquidation of said interest, and any surplus shall be appropriated, one-half to the improvement of the park and the other half to the extinguishment of the principal of said bonds. The said interest shall be a first lien on the taxes so collected to the amount thereof due at the time. Said tax shall be a lien on the property assessed and the same penalty and interest shall be paid, in case of non-payment as is provided for other taxes levied by the State."

The principal objections urged against the validity of the act are, first, that the passage of such an act was directly prohibited by the constitution, and secondly, that it levies a special tax for public purposes.

The fourth section of the eighth article of the constitution says: "Corporations may be formed under general laws, but shall not be created by special acts except for municipal purposes."

The fifth section of the same article declares that "no municipal corporations, except cities, shall be created by special

act, and no city shall be incorporated with less than 5,000 permanent inhabitants, nor unless the people thereof by a direct vote upon the question shall have decided in favor of such incorporation."

About the interpretation of the fifth section there can be no doubt. It prohibits entirely the incorporation of any municipal corporation, except cities, by special act of the legislature and then only when they contain 5,000 permanent inhabitants.

The fourth section places a total prohibition upon the chartering of corporations by special acts except they be for municipal purposes.

The real end to be reached is to ascertain in what sense the convention, that framed the constitution, used the terms "municipal corporations" and "corporations for municipal purposes." If the two terms employed are interchangeable and express synonymous ideas, then there can be no further controversy, and it was clearly incompetent for the legislature to pass the special act we are now considering.

When the constitution uses words having a well defined technical legal meaning, it will be presumed that they were used in accordance therewith. But when no such language is used, then the interpretation should be according to the usual and general acceptance of its meaning.

The constitution was adopted by the people for the government of the people, and its framers must be understood to have employed words in their natural sense, and to have intended what they said. What is meant by a municipal corporation is well known by all law writers, and is sharply defined and recognized. In a case decided at the present term it was said: "The definition of a municipal corporation would only include organized cities and towns and other like organizations with political and legislative powers for the local, civil government and police regulations of the inhabitants of the particular districts included in the boundaries of the corporation." (*Heller vs. Stremmel*, 52 Mo., 309.)

There are other corporations of a public character created

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by the legislature for public purposes. These are political sub-divisions or State agencies and are denominated *quasi* corporations. They constitute a part of the State government with special powers, duties and functions. Their duties are generally local, it is true, but they act in obedience to State laws and derive all their power to act from the sovereign power of the State.

In a recent elementary treatise the author thus lays down the distinction between the different classes: "All corporations intended as agencies in the administration of civil government are public as distinguished from private corporations. Thus, an incorporated school, district or county, as well as city, is a public corporation; but the school-district, or county, properly speaking, is not, while the city is, a municipal corporation. All municipal corporations are public bodies, created for civil or political purposes; but all civil, political or public corporations are not, in the proper use of language, municipal corporations." (Dill. Mun. Corp., § 10). As the county is a political agency or *quasi* corporation, instituted for convenience and to carry out the purposes of the government, the legislature possesses the undoubted right to direct the manner in which it shall proceed, and to determine what shall be done with what is entrusted to its care. (State, &c. vs. St. Louis County Court, 34 Mo., 546; Hamilton vs. St. Louis Co., 15 Mo., 3.) But although elaborately argued I cannot see that these principles help the act in question. Public corporations are expressly forbidden to be chartered by special acts. By this act there is no municipal corporation chartered nor attempted to be chartered. The declaration that the corporation is for municipal purposes does not make it so. There may be corporations for municipal purposes, but they must be connected with the municipal corporation itself and instituted for the purpose of carrying out some of the known objects of the municipality. But in the present case a district outside of the city is incorporated; none of the commissioners who have the exclusive management and control of it reside within its boundaries; the peo-

ple who own the lands within it are taxed against their consent by persons who have no interests in common with them, and then they are gravely told that resistance is useless ; that they have been incorporated for municipal purposes. If this can be done, then special acts of incorporation for municipal purposes may be passed in the vicinity of all our towns which do not rise to the dignity of cities, but are nevertheless municipal corporations, and the farming community will be made to pay for whatever they fancy or conceive will redound to their benefit. If the legislature can do this, it is difficult to set any bounds to their power. The constitution never contemplated such an exercise of power, but sought on the contrary to place a prohibition on it. Its language, fairly and properly interpreted, does not countenance it. The ingenious arguments that have been made to sustain the validity of the act resolve themselves into plausible pretexts for violating the plain meaning of the constitution.

In the construction of the constitution I am unwilling to apply to it those elastic principles which will make it extend any required length to accomplish an end or a purpose. Unless some regard is paid to the injunctions of our organic law, written constitutions of government will be regarded as of no value, and the experiment of setting a boundary to capricious and arbitrary power will be a complete failure.

But there is another point which remains to be noticed. By the law, the park is set apart for the free use and enjoyment of the people forever, and it is declared to be of great importance to the city of St. Louis, conducive alike to the dignity and character of the city and the recreation, health and enjoyment of its inhabitants. Yet, strange as it may appear, neither the people themselves nor the inhabitants of the city of St. Louis, for whose especial benefit it is created, are taxed one cent for its establishment ; but the exclusive privilege of paying nearly one and a quarter millions of dollars is cast upon a few citizens who are inhabitants of the district. Nothing is better settled than that special taxation for objects that are general and public is illegal.

In the case of *Wells vs. The City of Weston*, (22 Mo., 384,) it was decided that the legislature could not authorize a municipal corporation to tax, for its own local support, lands lying beyond the corporate limits.

In the *Egyptian Levee Company vs. Hardin*, (27 Mo., 495) the corporation was formed for the purpose of reclaiming a certain district from inundation by leveeing, ditching and embanking, and the tax was on the land-owners within the district whose property was reclaimed and benefited. They were the persons primarily interested, and it was a local taxation for a local purpose.

The case of the *Owners, etc. vs. The Mayor of Albany* (15 Wend., 374), which has been cited as directly in point, is totally dissimilar to the case here. There it was held that, taking the grounds of individuals in a city to convert into a public square was taking private property for public use as much as if the grounds had been converted into a street, and the fact that the damages were assessed upon the owners of adjoining property, instead of being levied as a general tax upon the city was no evidence that the property was not taken for public use. In that case the property was taken by the city, in the city and for the city. In the present case the property is not in the city; it is not taken by the city, but it does purport to be for the use of the city. That is to say, citizens outside of the city are deprived of their property for the special use and benefit of the city. Admit this principle, and it would be perfectly competent for the legislature to pass a special act authorizing the building of a court-house for the use of the whole county and assess the cost of construction against the few individuals who happen to own property immediately adjoining the court-house square. Thus we have the broad pretension set up of justifying special taxation for objects which are avowed to be general and not local. Local assessments are constitutional only when imposed to pay for local improvements conferring special benefits. Uphold this law, and the time will probably come when it will be deemed advisable to provide statuary and other costly adornments for

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the park. There would be nothing to hinder their cost being provided for in the same way.

The legislature has no power to take the money of one man and transfer to another, nor can it select a particular township and say that it shall pay all the taxes of the county, nor designate a certain county and declare it shall assume all the burdens of the State. Yet that is precisely the principle that must be established to sustain this act.

The constitution has wisely erected a barrier against this exorbitant power, and there is a time in the tide of this special taxation when it must be said, "thus far shalt thou go and no farther!"

There is no question as to the desirableness of public parks in the vicinity of large cities and the benefits the people derive from them; but these benefits would be too dearly purchased at the expense of a violated constitution, and by striking down the sacred rights of the citizen.

I am of the opinion that there could be a judgment of ouster. All the judges concur except Judge Sherwood, who is absent.

ON MOTION FOR RE-HEARING.

ADAMS, Judge, delivered the opinion of the court.

In overruling this motion for a rehearing, it may be proper to state briefly, some additional views which influenced the result unanimously arrived at by the court.

The fourth section of the eighth article of the constitution provides: "Corporations may be formed under general laws, but shall not be created by special acts, except for municipal purposes," etc.

By the fifth section of the same article it is provided: "No municipal corporations except cities, shall be created by special act; and no city shall be incorporated with less than five thousand inhabitants."

From these provisions it is manifest that the legislature is prohibited from creating any sort of corporations by special acts, except such as are for municipal purposes.

A corporation for municipal purposes is either a municipality, such as a city, or town, created expressly for local self-govern-

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ment, with delegated legislative powers; or it may be a sub-division of the State for governmental purposes, such as a county, a school or road district, &c. These sub-divisions are sometimes called *quasi* corporations; but they are nevertheless corporations within the meaning of the constitution. It was therefore eminently proper, in framing the constitution, that there should be no express or implied prohibition against creating such sub-divisions or *quasi* corporations for municipal purposes.

The phrase, "municipal purposes," was intended to embrace some of the functions of government, local or general; and no corporation, not exclusively designed for this end, can be properly denominated a corporation for municipal purposes. (See Ang. and Ames Corp., 8, 17, secs. 15 to 24, inclusive; Dill. Mun. Corp., 30, 31; Cooley's Const. Lim., chap. 8; Hamilton county vs. Mighels, 7 Ohio St., 109.)

The constitution allows cities of not less than five thousand inhabitants to be incorporated by special act. The design was that their charters should contain all powers necessary and proper for the management of local matters; and it was not contemplated that independent corporations should be created by special acts to perform any of the functions of a city government.

Cities may be permitted to establish and maintain parks for the convenience and use of the public. If their charters do not provide for this, they may be amended so as to embrace the requisite powers. But all such charters are subordinate to the general welfare of the State, and therefore, sub-divisions of the State or *quasi* corporations may be created by special acts if necessary, within the limits of a city, for government purposes, or in the language of the constitution, for municipal purposes.

It may be urged that such sub-divisions ought to be created by general laws, without resort to special legislation. As a general rule this is true. But cases might arise where special acts might become absolutely necessary; such as the establishment of a new county, or a new school district in some partic-

ular locality, &c. It may also be contended that the constitution as a whole, without regard to these provisions, necessarily implies power in the Legislature to create sub-divisions of the State for municipal purposes. This, no doubt, would be a proper deduction, if the prohibitory clauses had been omitted. A State Legislature may, within the sphere for which it was created, exercise all legislative power not prohibited by the constitution of the United States or its own State constitution.

The aim of the constitution was to prevent the creation of corporations by special legislation, except for a particular purpose. In framing this prohibition, it was necessary to exclude the idea that *quasi* corporations, or sub-divisions of the State for municipal purposes, were to be embraced among the inhibited acts of legislation. No language could have expressed this more clearly than the phrase "except for municipal purposes," as used in the constitution.

The question in regard to taxing a particular locality for general purposes, is sufficiently discussed in the opinion under review: Private property cannot be taken for public use without a just compensation. Special benefits cannot form any part of such compensation, unless they attach to and become a part of the taxed property. The phrase, "special benefits," is a misnomer as applied here. A lot holder has a property interest or easement in the adjoining street independent of the general public, and the improvement of the street may be a special benefit or an absolute injury to his lot. If it be a benefit he must pay for it, and a special tax may be levied on his lot for that purpose. But adjacent property holders can have no easement or property right whatever in a park. Their interest is precisely the same as all other citizens, and a tax upon them because of their locality, is only a thin guise for confiscating their property without any just compensation.

The motion for a re-hearing is overruled; all the judges concur except Judge Napton, who did not sit, having been of counsel.